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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 834.

MINNESOTA STATE LIBRARY.

MARCUS K. BITTERMAN, JULIUS MEHLIG, AND CHARLES T. KELSKO, PETITIONERS,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 14, 1906.
CERTIORARI AND RETURN FILED JUNE 4, 1906.

(20,257.)

(20,257.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 294.

MARCUS K. BITTERMAN, JULIUS MEHLIG, AND CHARLES T. KELSKO, PETITIONERS,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a *Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 1444.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
versus
MARCUS K. BITTERMAN ET AL., Appellees.

and

MARCUS K. BITTERMAN ET AL., Cross-Appellants,
versus
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Cross-Appellee.

Appeal and Cross-Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

[Original record filed March 8, 1905.]

U. S. Circuit Court of Appeals. Filed Jul- 1, 1905.
CHARLES H. LEDNUM.

1 UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

No. 13166. In Equity.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant,
versus
MARCUS K. BITTERMAN ET AL., Appellees.

Denegre & Blair, Esquires, for the Louisville & Nashville R. R. Co., Appellant.
Henry L. Lazarus, Esquire, for Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana, New Orleans Division, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within thirty (30) days from the eighth (8th) day of February, A. D. 1905, at the City of New Orleans, State of Louisiana.

Transcript of Appeal.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

No. 13166. In Equity.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Cross-Appellee,
versus
MARCUS K. BITTERMAN ET AL., Cross-Appellant.

Henry L. Lazarus, Esquire, for Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, Cross-Appellants.

2 Denegre & Blair, Esquires, for the Louisville & Nashville Railroad Co., Cross-Appellee.

Cross-Appeal of Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko from the Circuit Court of the United States for the Eastern District of Louisiana, New Orleans Division, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within thirty (30) days from the eighteenth (18th) day of February, A. D. 1905, at the City of New Orleans, State of Louisiana.

Transcript of Cross-Appeal.

Bill for Injunction, etc.

Filed May 9, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Louisiana, Sitting in Equity at New Orleans, Louisiana:

The Louisville and Nashville Railroad Company, a corporation created and organized under the laws of the Commonwealth of Kentucky, brings this its bill of complaint against Marcus K. Bitterman, Julius Mehlig, David Pike, Charles T. Kelsko, George H. Johnson, G. F. Young, and J. G. Finney, all of whom are citizens of the State of Louisiana and inhabitants and residents of the Eastern District of Louisiana.

And thereupon your orator complains and says:

I.

That your orator is a corporation created, organized and existing under the laws of the State of Kentucky, and a citizen of said State and not a citizen of the State of Louisiana.

3 That it owns and operates various lines of railway extending from New Orleans, Louisiana, to Mobile, Alabama, to Montgomery in the same State, to Nashville, Tennessee, to Louisville, Kentucky, to Cincinnati, Ohio; and also other lines of railway connections or extensions of said lines, which reach Pensacola, Florida; Memphis, Tennessee; St. Louis, Missouri, and many other places; that its said system of railroads aggregate- about 3000 miles and traverses the State- of Louisiana, Mississippi, Alabama, Florida, Tennessee, Virginia, Kentucky, Indiana and Illinois; it connects with various other railroads at various points, and by means of said connections it does and can reach all the railroad stations in the United States, Canada and Mexico. That over its said lines of railway it daily transports for hire large numbers of passengers, and large quantities of baggage, mail, express and freight to all points of the United States, as well as foreign countries.

II.

That the defendants above named are each and all citizens of the State of Louisiana; and residents and inhabitants of the Eastern District of Louisiana; that they are each what is known as a ticket broker or "scalper," and are engaged in the business of buying and selling the unused portions of railroad passengers' tickets, especially those tickets in the nature of excursions or special rate tickets issued on occasions of fairs, expositions, conventions and the like.

That defendants have been joined herein because their business and transactions complained of are in act, purpose and effect identical, and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them.

III.

That the veteran soldiers who fought on the side of the Confederate States in the late war between the States have associated themselves together under the name of the United Confederate Veterans, and are accustomed to hold annually a convention or reunion in some one of the cities of the Southern States, which reunion is attended in large numbers by said veterans and their families and friends and by many others interested therein. That the last of said reunions was held at Dallas, Texas, in April 1902, on which occasion the Governor of this State, the Mayor of this City, the Commercial Exchanges and the Progressive Union, an organization representing

4 the business interests of this city, invited and urged the said veterans to hold their next meeting in the City of New Orleans; that this invitation was accepted and, accordingly, the United Veterans' Reunion will take place in New Orleans, beginning

on May 19th and continuing to May 22nd, 1903; that the people of this city and State are interested in the success of such reunion, not only from sentimental and patriotic motives, but by reason of the material benefits which will result from a large attendance thereat.

IV.

That soon after the acceptance of said invitation, at the request of the resident veterans of this city, an executive committee, composed of twenty-one leading and representative citizens, was formed for the purpose of making, and it has undertaken to make, the extensive preparations and arrangements necessary to secure a large attendance at said reunion, to care for the veterans attending thereon, and generally to insure the success of said meeting; that among other things, said committee have called for voluntary contributions of money from the citizens of New Orleans, and large sums of money, exceeding, as your orator is informed and believes, the sum of forty-five thousand dollars, have been raised in this way, and additional sums are being daily received; that the fact of such reunion has been extensively advertised throughout the United States and large numbers of veterans and their friends and others interested are preparing to attend, especially along the aforesaid lines of railway of orator and its connections.

That a large proportion of the said veterans and others who usually attend said reunions are people of limited means who would not be able to come to said reunion if they had to pay the regular rates for the transportation of passengers on the railroads leading to New Orleans; that it was accordingly deemed by said committee to be essential, and it was in fact essential, to the success of said reunion and to secure a large attendance thereat for the various railway companies and their connections entering New Orleans to issue round trip tickets for the transportation of people to said reunion, and return at rates very much below the regular lawful and reasonable rates customarily charged by them.

V.

That at the request of said committee, your orator agreed to make special rates and to issue special excursion tickets to those desiring to attend said reunion, which rates and tickets amount to a less charge for the trip to New Orleans and return than the regular lawful and reasonable charge one way to New Orleans, and involves a reduction to about one-third of the regular fare, namely a charge of one cent per mile in the place of the regular rate of three cents per mile, which reduced rates and excursion tickets are participated in by most of orator's connections.

That accordingly orator and its connections have arranged to put in force, and have extensively advertised the fact that they will put in force, special reduced rates and issue round trip excursion tickets to all those who desire to attend said United Confederate Veterans' Reunion at New Orleans and who will observe the conditions attached thereto, at a cost equivalent to one cent per mile,

the regular and reasonable rate lawfully charged by orator, except at a few competitive points, being three cents a mile.

VI.

That the form of ticket which orator has provided for the use of those who desire to attend said reunion from places on its said line of railway declares on its face that it is a non-transferable reduced rate ticket "issued account of U. C. V. Reunion, 1903," good subject to the conditions printed thereon for one first-class passage to New Orleans and return, the going trip to begin on date of sale and the return trip to begin leaving New Orleans not later than May 24th, 1903, and it also provides for an extension of the final leaving date on the application of the original purchaser; that among the conditions on the face of said ticket, which ticket contract is signed by the original purchaser and the company is one, that said ticket is non-transferable, and if presented by any other than the original purchaser, who is required to sign the same at date of purchase, it will not be honored but will be forfeited, and any agent or conductor of any of the lines over which it reads shall have the right to take up and cancel the entire ticket (both going and return portions); that a copy of said form of ticket is hereto annexed, marked Exhibit A, and made part of this bill.

VII.

6 Orator is informed and believes, and so avers, that the attendance upon said reunion will be very large and that over one hundred thousand people will be transported to the meeting by the various railroads terminating in this city, of which number fully one-fourth will travel over orator's lines of railway and make use of said round-trip non-transferable U. C. V. Reunion tickets. That the large number of people to be carried by orator on the occasion of said reunion has rendered it necessary for it to issue a ticket the return portion of which will not have to be signed by the original purchasers, as it will be impracticable to secure such signatures in time to enable the owners thereof to depart when desired, and the same would be a great inconvenience and source of annoyance and expense to the people for whose benefit such tickets are to be issued; that, also, by reason of the large number of persons to be carried on said occasion, it is wholly impracticable to have the return portion of said ticket presented to any agent of orator in this city, where the identification of the original purchaser can be properly made, and that it is equally impracticable for the train conductor or collector while in the management of his train and in charge of so many passengers thereon, to identify properly the persons presenting return portions of said tickets, and at the same time give proper care and attention to the safety and welfare of such passengers and the operation of said train.

VIII.

That orator consented to said reduction of rates and provided for the issuance of said non-transferable tickets in reliance upon

being protected from the fraudulent dealings in said tickets by defendants after the same are issued, as hereinafter set forth, and unless it is so protected in the issuance and sale of said tickets as hereinafter prayed for, it cannot afford to make the very low rates for said reunion which it has consented to make and it cannot afford in the future, on similar occasions, of conventions or other assemblies or celebrations in this city, to make reduced rates, on account of the irreparable injury, for which it has no adequate remedy at law, which will be inflicted upon it by reason of said fraudulent dealings of defendants.

IX.

That defendants, and each of them, are engaged in the business of buying and selling the unused portions of railroad tick-
7 ets, being commonly called ticket brokers or "scalpers;" that they are accustomed to buy and sell the return coupons of non-transferable tickets, especially those sold at reduced rates for special occasions, for the express purpose, and no other, of putting them in the hands of purchasers, who will use the same to secure passage on orator's or other railroads by falsely impersonating the original purchaser, falsely and wrongfully signing his name, when such signature is required falsely stating that he is the original purchaser, and thus by fraud and imposition deceive, impose upon and defraud orator and other railroad companies to their continuous loss, detriment and damage; that orator has frequently in the past, as, for example, on the occasion of the Mardi Gras festivals, in this city, issued reduced rate non-transferable round-trip tickets, and the said ticket scalpers have always fraudulently dealt in the return coupons thereof as above set forth, to the great and irreparable injury of orator's business.

X.

That orator is informed and believes, and also knows from past experience, and so avers, that defendants, and each of them will, unless restrained by this Honorable Court buy and sell the return portions of said United Confederate Veterans' Reunion tickets, soliciting, persuading and inducing the holders of such return portions or coupons to sell the same; and said defendants, and each of them, with full knowledge of the character and terms of said tickets and well aware of the fact that the same are issued at a low special rate to induce and enable the public to attend said reunion, will offer the same for sale and sell them to persons other than the original purchasers at a lower rate than that lawfully charged by orator between the same points on its lines or those of its connections, for a like distance one way, and by false and fraudulent representations that said tickets are in fact transferable and good for use by other than the original purchasers, or by connivance with said proposed purchasers and by inducing and assisting them to impersonate the original purchaser, said defendants, and each of them, will, unless, restrained deal regularly in said tickets or the return portions thereof, thus de-

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frauding orator of thousands of dollars, and deceiving its conductors and employees and, in many instances, the purchasers of said tickets.

8 XI.

That by reason of the impossibility of preventing or detecting said frauds as herein set forth, orator, will be subjected to constant and frequently repeated losses and irreparable injury (far exceeding the sum of five thousand dollars, exclusive of interest and costs), and such of the public as shall innocently purchase said tickets to pecuniary losses, as well as to great annoyance and humiliation.

XII.

That the additional burden cast upon orator's conductors and collectors, by reason of such fraud, of distinguishing the rightful owners of said return portions of said tickets from the pretended owners and fraudulent holders thereof, or those who have been fraudulently induced by defendants or their agents to purchase said portions, will inevitably subject orator to the danger of a multiplicity of suits for damages, where unavoidable errors are made by such conductors and collectors, and unavoidably and necessarily subject the public and orator to great interruption, delay and much expense in the operation of orator's railroad trains, and the probable effect thereof will be to deter many persons from using said tickets in traveling on said trains, and thereby wholly prevent many deserving people of limited means from attending said reunion.

That orator has no means of discovering who the persons are who will so defraud it, by the purchase and use of said tickets, and who would be compelled to pay the lawful and reasonable one-way rates for such tickets, which said lawful and reasonable rates are much higher than the special reduced rates made by orator at the request of said committee for the said reunion.

XIII.

That orator has no adequate remedy at law against said defendants because of the impossibility of securing evidence establishing the facts as to said fraud, and, if, such evidence could be obtained, it would necessitate a multiplicity of suits, because the injury to its business cannot be estimated or compensated in dollars and cents, and because defendants, and each of them, are financially irresponsible, and no judgments obtained against them at law could be collected on execution.

That consequently orator has no adequate remedy at all
9 against defendants or any of them for the frauds which they are about to perpetrate, unless they are restrained by orders of this Honorable Court.

XIV.

Orator further shows that al [at] all times it is its custom and usage, and that of its connecting lines, to issue tickets at reduced rates on various occasions to the traveling public, which, by the terms thereof are not transferable, and constitute a special contract in express

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terms between orator, the lines issuing the same, all other lines over which the same entitle the holder to travel, and the original purchaser thereof, whereby the said original purchaser agrees that said ticket shall not be transferred by him to any other person.

XV.

That the defendants, and each of them, are, and have been for some time, engaged in the business of buying and selling and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and transfer the same to defendants or some of them, with the intent and purpose that such tickets shall be used, in violation of the terms thereof, by persons other than the original purchaser, with the full knowledge on the part of defendants and each of them that the same is a fraud upon orator.

XVI.

That unless orator has the injunctive relief herein prayed for, it cannot continue to make special reduced rates as heretofore on the occasion of conventions, Mardi Gras festivals, and other like occasions, frequently occurring, when it is to the great material interest of this city that large number of visitors should attend, which attendance cannot be secured except by the issuance of special rate nontransferable round-trip tickets as aforesaid.

XVII.

Orator further shows that there are organized in the United States, and in active operation, three associations, known as the "American Ticket Brokers' Association," the "National Ticket Brokers' Association," and the "Guarantee Ticket Brokers' Association;" that all ticket brokers, or "scalpers," including defendants, are numbers [members] of one or another of said associations and under the rules and regulations thereof, act in concert together in all matters herein explained and set forth; that the object of said association is to more closely ally with each other the interest of the various ticket brokers or scalpers of the United States, each association assisting each individual who is a member thereof in defending his law suits and in all matters pertaining to the prosecution or defense of their supposed rights and pertaining to the business they transact, whether legal or illegal; that the members of said associations act in concert together as one person, all contracts made and all tickets sold by any member thereof being guaranteed by the association.

XVIII.

That the nature of the business of all ticket brokers and "scalpers" and the methods of conducting the same are alike, all making use of the fraudulent devices and misrepresentations, hereinbefore complained of, to dispose of non-transferable tickets which form a large part of their stock in trade; that they are practically in a combination or conspiracy to defraud railroad companies by inducing, persuading or misleading the traveling public to sell or buy such nontransferable ticket contracts.

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That injunctive relief similar to that herein sought has been accorded railroad companies by the courts sitting in other cities and States of this country, and the ticket brokers and scalpers have sought to evade said injunctions by ostensibly assigning their business to some other ticket broker not named in the order; that, moreover, numbers of scalpers from other places emigrate to the city where the injunction has been granted and seek to engage in the same business and thus to render valueless the process and orders of the Court.

That in order to afford complete and effective relief, the restraining injunctive orders should be broad enough to include all who knowingly do what the order of Court prohibits defendants from doing or who aid or abet defendants in violating the injunction or in defeating the object and purpose thereof.

XIX.

That the amount involved in this controversy exceeds, exclusive of interest and costs, the sum of five thousand dollars, that the value of the business which orator seeks to protect and the rights which it seeks to have recognized and enforced exceeds in the case of each defendant the sum of five thousand dollars, exclusive of interest and costs.

XX.

That orator is without adequate or substantial relief in the premises, except by the interposition of this Honorable Court by its writ of injunction, enjoining and restraining defendants and each of them and all other persons, whomsoever though not named herein, from doing any of the acts hereinbefore complained of.

To the end therefore that said defendants herein named may answer the several matters and things hereinbefore set forth, as fully and particularly as if the same were herein again repeated and they were thereto severally interrogated, and that a writ of injunction may be issued out of and under the seal of this Court, and orator prays that the same may be so issued, to be directed to the said Marcus K. Bitterman, Julius Mehlig, David Pike, Charles T. Kelsko, George H. Johnson, G. F. Young and J. G. Finney (the Christian names of those defendants indicated by initials being unknown to orator), and to their or his agents, servants, employees, assigns, successor and successors and all others acting for defendants or any or either of them, and all other persons whomsoever to restrain them and each of them, his or their agents, servants, employees, assigns, successors and successor, and all others acting for defendants or any or either of them, and all persons whomsoever though not named herein from and after the time when they severally have knowledge of the entry of the restraining order and the existence of the injunction herein, from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets or the return coupons or unused portions thereof issued by orator or by any other railroad company for use over orator's lines of railway or any part of them which by the terms thereof are non-transferable, or from soliciting, advertising, encouraging or procuring any persons other than the original purchaser of

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such tickets, to use or attempt to use said tickets for passage on any train or trains of orator, especially including the non-transferable round-trip tickets issued for use on the occasion of the United Confederate Veterans' Reunion at New Orleans in May, 1903;
12 and that, in the meantime, until the hearing thereof, your orator may have a temporary restraining order embracing all of the relief herein prayed for, such restraining order to continue in force until the termination of the hearing for a writ of injunction and to be binding upon all persons to whom addressed from and after the time when they shall severally have knowledge of the entry thereof, and that on the final hearing of this cause, it may have all injunctions herein craved made perpetual; and that orator may have such further or other relief in the premises as the nature of the circumstances of the case may require.

May it please your Honors to grant unto your orator writ or writs of subpœna, directed to said defendants above named, and each of them, thereby commanding them and every one of them, at a certain day and under a certain penalty, to be therein provided, personally to be and appear before this Honorable Court, and then and there full, true, direct and perfect answer make to this bill of complaint (but not under oath, answer under oath hereby waived); and further stand to, perform and abide such further orders, directions and decrees herein as to your Honors shall seem fit; and your orator will ever pray, etc.

(Signed) DENEGRE, BLAIR & DENEGRE,
Solicitors for Complainant.

Charles Marshall, being duly sworn, deposes and says, that he is superintendent of the Louisville and Nashville Railroad Company, complainant; that its president and vice-president and other general officers are absent from the state; that he has read the foregoing bill of complaint and knows the contents thereof, and that the statements thereof are true and correct, to the best of his knowledge, information and belief.

(Signed) CHAS. MARSHALL.

Sworn to and subscribed before me this 4th day of May, 1903.

(Signed) FELIX J. PUIG,
[SEAL.] *Notary Public.*

J. K. Ridgely, being duly sworn, deposes and says that he is Division Passenger Agent of the complainant, the Louisville and Nashville Railroad Company; that he is familiar with the subject matter of this litigation and has read the foregoing bill and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are stated upon information and belief, and as to all such matters, he believes the same to be true.

(Signed) J. K. RIDGELY.

13 Sworn to and subscribed before me this fifth day of May, 1903.

(Signed) FELIX J. PUIG,
[SEAL.] *Notary Public.*

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The foregoing bill, exhibits and affidavits considered:

It is ordered that a restraining order do issue against the defendants as prayed for, and it is further ordered that the defendants do show cause before this Court on the — day of ——, 1903, at eleven o'clock A. M., why a preliminary injunction should not issue as prayed for.

Let the foregoing bill of complaint be filed and let an order issue notifying defendants to show cause before me on Wednesday the 13th of May, 1903, at 11 A. M., why a preliminary injunction should not issue herein as prayed for.

New Orleans, La., May 9, 1903.

(Signed) CHARLES PARLANGE,
U. S. Judge.

EXHIBIT "A"—Being sample of Reduced Rate Ticket issued by the Louisville & Nashville R. R. Co., Account U. C. V. Reunion, 1903; filed with bill of complaint and made part thereof.

NOTE.—Transmitted along with this transcript of appeal in the original, as per stipulation of counsel copied at page 201 hereof.

Copy of Order on Bill for Injunction.

Filed May 12, 1903.

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

No. 13166. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

Let the foregoing bill of complaint be filed, and let an order issue notifying defendants to show cause before me on
14 Wednesday, the 13th of May, 1903, at 11 A. M., why a preliminary injunction should not issue herein as prayed for.

New Orleans, La., May 9, 1903.

(Signed) CHARLES PARLANGE,
U. S. Judge.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original on file in this office.

Witness my hand and seal of said Court at the City of New Orleans, this 9th day of May, 1903.

[SEAL.] (Signed) H. J. CARTER, *Clerk.*

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Marshal's Return.

Filed May 12th, 1903.

On the 9th day of May, 1903, I served copy hereof on the following named parties, in New Orleans, La., by handing the same to them in person, viz: David Pike, Marcus K. Bitterman, Charles T. Kelsko, G. F. Young and Julius Mehlig.

(Signed) CHAS. FONTELIEU,
U. S. Marshal,
By T. I. GALBRETH,
Deputy U. S. Marshal.

Subpœna Issued to Marcus K. Bitterman May 9th, 1903.

UNITED STATES OF AMERICA:

The President of the United States to the Marshal for the Eastern District of Louisiana, Greeting:

You are hereby commanded to summon Marcus K. Bitterman to appear before the Honorable the Judges of the Fifth Judicial Circuit of the United States of America, at a Circuit Court to be holden on the first Monday of June, 1903, then and there to answer a — bill in chancery, filed against him and others wherein the Louisville & Nashville Railroad Company is complainant and the said Marcus K. Bitterman and others are defendants.

Herein fail not, and have you then and there this writ,
15 with your endorsement thereon, how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 9 day of May, in the year of our Lord one thousand nine hundred and three, and the 127th year of American Independence.

[SEAL.] (Signed) H. J. CARTER, *Clerk.*

The defendant is hereby notified that he is required to enter his appearance in the Clerk's office of the United States Circuit Court, on or before the first Monday of June, 1903, otherwise the bill may be taken *pro confesso.*

(Signed) H. J. CARTER, *Clerk.*

Marshal's Return.

Filed May 12, 1903.

Received by U. S. Marshal, New Orleans, La., May 9th, 1903, and on the same day, month and year I served copy hereof on

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Marcus K. Bitterman, by handing the same to him in person, in the City of New Orleans, Louisiana.

CHAS. FONTELIEU,
U. S. Marshal,
(Signed) By T. I. GALBRITH,
Deputy U. S. Marshal.

(Indorsed:) United States Circuit Court, New Orleans Division. No. 13,166. The Louisville & Nashville R. R. Co. *vs.* Marcus K. Bitterman, *et al.* Subpœna in Chancery.

Marshal's Return.

Filed May 12, 1903.

On Subpœna in Chancery Issued to Julius Mehlig on May 9, 1903.

Received by U. S. Marshal, New Orleans, La., May 9th,
16 1903, and on the same day, month and year I served copy hereof on Julius Mehlig by handing the same to him in person, in the City of New Orleans, Louisiana.

CHAS. FONTELIEU,
U. S. Marshal,
(Signed) By T. I. GALBRITH,
Deputy U. S. Marshal.

Marshal's Return.

Filed May 12, 1903.

On Subpœna in Chancery Issued to David Pike, on May 9, 1903.

Received by U. S. Marshal, New Orleans, La., May 9th, 1903, and on the same day, month and year I served copy hereof on David Pike by handing the same to him in the City of New Orleans, La.

CHAS. FONTELIEU,
U. S. Marshal,
(Signed) By T. I. GALBRITH,
Deputy U. S. Marshal.

Marshal's Return.

Filed May 12, 1903.

On Subpœna in Chancery Issued to G. F. Young on May 9, 1903.

Received by U. S. Marshal, New Orleans, La., May 9th, 1903, and on the same day, month and year I served copy hereof on G. F. Young by handing the same to him in person in the City of New Orleans, Louisiana.

CHAS. FONTELIEU,
U. S. Marshal,
(Signed) By T. I. GALBRETH,
Deputy U. S. Marshal.

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17 *Marshal's Return.*

Filed May 12, 1903.

On Subpœna in Chancery Issued to Charles T. Kelsko, May 9, 1903.

Received by U. S. Marshal, New Orleans, La., May 9th, 1903, and on the same day, month and year I served copy hereof on Charles T. Kelsko by handing the same to him in person, in the City of New Orleans, Louisana.

CHAS. FONTELIEU,
U. S. Marshal,
(Signed) By T. I. GALBRETH,
Deputy U. S. Marshal.

Order Continuing Applications for Injunction.

Extract from the Minutes of Wednesday, May 13, 1903.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

No. 13167.

TEXAS & NEW ORLEANS R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

The application for writs of injunction in the above causes, not being reached this day, it is ordered that the same be continued until to-morrow at 11 A. M.

Hearing and Continuance of Application for Injunction.

April Term, 1903.

NEW ORLEANS, THURSDAY, *May* 14, 1903.

Court met pursuant to adjournment:
Present: Hon. Aleck Boarman, District Judge.

18 No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

This cause came on to be heard upon the application of the complainant for a preliminary injunction herein.

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Denegre, Blair & Denegre, appearing for complainant; H. L. Lazarus, Girault Farrar and Jas. O'Connor, for defendants Marcus K. Bitterman, Chas. T. Kelsko and Julius Mehlig, and was argued by counsel and continued until to-morrow at 10 A. M.

Answer of Marcus K. Bitterman, Julius Mehlig and Chas. T. Kelsko.

Filed May 14th, 1903.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

No. 13166. In Equity.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Louisiana, sitting in Equity at New Orleans:

The joint and several answer of Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, each and all of whom are citizens of the State of Louisiana and residents of the Eastern District of Louisiana, to the bill of complaint, herein exhibited against them.

These defendants, now and at all times hereafter, saving to themselves all and all manner of benefit, or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, imperfections and contradictions in the said bill of complaint contained, for answer thereto, or to so much thereof as these defendants are advised it is material and necessary for them to make answer to, severally and jointly answering, say:

I.

That these defendants severally admit that the first paragraph of said bill is true; that the complainant is a corporation created, organized and existing under the laws of the State of Kentucky, and as such is a citizen of said state; that it owns and operates various lines of railway extending from New Orleans, La., to Mobile, Ala., to Montgomery in the same state; to Nashville, Tenn.; to Louisville, Ky.; to Cincinnati, O.; and also other lines of railway connections or extensions of said lines which reach Pensacola, Florida, Memphis, Tenn., St. Louis, Missouri, and many other places; that its said system of railroads aggregates about three thousand miles and traverses the States of Louisiana, Mississippi, Alabama, Florida, Tennessee, Virginia, Kentucky, Indiana and Illinois; that it connects with various other railroads at various

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points, and by means of said connections in [it] can and does reach all the railroad stations in the United States, Canada and Mexico; and that over its said lines of railway it daily transports for hire large numbers of passengers, and large quantities of baggage, mail, express, and freight, to all points of the United States, as well as foreign countries. And in this connection, respondents aver that the statement contained in the last clause of the first paragraph in said bill of complaint contained, is as matter of fact true of all railway systems in the United States of America generally; and as matter of law, respondents say that the complainant is a common carrier of passengers and freights, and that it is compelled by law to transport or perform services as a carrier of all persons under similar circumstances and conditions when tendered lawful, just and reasonable fares or tickets showing the payment to such carriers of the price of such service pursuant to the Act of Congress commonly known as the Interstate Commerce Law.

II.

For further answer, these respondents deny the averments of the second paragraph in said bill contained, said bill falsely charging that all of the defendants named in the bill are citizens of the State of Louisiana and residents and inhabitants of the Eastern District of Louisiana, but on the contrary thereof, these defendants aver, upon information and belief, that none of the defendants named in said bill are citizens of the State of Louisiana, or residents thereof, except the said Bitterman, the said Mehlig and the said Kelsko, respondents herein.

20 These respondents, further answering, say that they are each separately engaged in what is known as the ticket brokerage business, buying and selling the unused portions of railroad passenger tickets, as well as buying tickets over the counters of railroad companies having offices and doing business in the City of New Orleans, and selling such tickets to their patrons and customers, a business commonly practiced and well known in all of the cities in the United States where two or more railroads have stations and offices; that these respondents, the said Bitterman, the said Mehlig, and the said Kelsko, are each and all of them separately licensed as such ticket dealers or brokers by the City of New Orleans and by the State of Louisiana, and have been so licensed, and have paid their licenses, for many years, including the year 1903; that these respondents are also reputable citizens and residents of the City of New Orleans, and tax-payers therein, paying taxes to the City of New Orleans and to the State of Louisiana upon their several properties.

Respondents jointly and severally deny the charge in manner and form as set out in paragraph II of said bill of complaint, that the business operations and transactions of all of the defendants named in said bill are in act, purpose and effect identical; but, on the contrary thereof these respondents aver that they know nothing of, and have no concern with, the business or dealings of any of the other defendants named in the bill, except the said respondents,

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Bitterman, Mehlig and Kelsko; and that the business of these respondents are independent of each other, and they have no common interest in the several business of the various defendants named in the bill.

III.

Respondents admit to be true so much of the matters set forth in the third paragraph of said bill of complaint as are, to the effect that there has been planned and arranged a reunion of Confederate Veterans to take place in the City of New Orleans, beginning on the 19th of May, 1903, and continuing to May 24th, 1903; that the people of the city and state are interested financially in the success of said reunion, and in the bringing of a large number of visitors, composed of Confederate Veterans and others, to attend at said reunion in the City of New Orleans; and that it is hoped and expected that material benefits will result from a large attendance of people at said reunion.

That the material benefits that will result to people outside
21 of the City of New Orleans will be due to the fact that persons outside of the City of New Orleans will be enabled to buy cheap round trip tickets from points outside of New Orleans and outside of the State of Louisiana on the line of complainant's railway, and on the lines of other railroads, to the City of New Orleans at cheap rates; and that many of the said persons who so come to the City of New Orleans, by selling the unused portions of their tickets after reaching New Orleans, will be enabled to remain in the City of New Orleans a longer time than the period of said reunion, and return to their homes or go elsewhere; and that the facilities thus afforded to persons in the City of New Orleans who may wish to travel away from said city, will result in general public benefit and the promotion of travel and commercial intercourse between the City of New Orleans and the neighboring states.

IV.

Respondents admit the charge to be true, as set out in the first clause of paragraph IV of said bill of complaint, that an executive committee of citizens have made preparations and arrangements to secure a large attendance at said reunion, to provide proper entertainment, and to insure the success of said meeting; that said committee has raised the sum of money stated in said fourth paragraph, and is still making collections in order to carry out the purposes of said reunion; that said reunion has been advertised in various parts of the United States, including points along the lines of complainant's railway; and that a large proportion of veterans and other persons who will attend said reunion are people of limited means, who would not be able to travel to and fro unless reduced rates were made by the railway companies reaching the place of said reunion. And respondents aver that each of them have subscribed to the said fund so raised.

Respondents do not deny that it was deemed essential by the aforesaid committee and by the railway companies, including the com-

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plainant and its connections, in order to induce a large number of persons to attend said reunion, for such railway companies to issue so-called "round-trip" tickets for the transportation of such people to said reunion and return, at rates below those usually charged by the said railways, including the complainant and its connecting lines; but that, in making said reductions in rates, it was so done by said railway companies in their own interest and with the sole
22 expectation of profit, and such railways were not moved by considerations of sentiment or so-called patriotism.

V.

Respondents admit that the said complainant and its connections have made or have agreed to make so-called special rates, and to issue so-called special excursion tickets for persons desiring to attend said reunion or to come to the City of New Orleans during the time that said tickets shall be put on sale by said complainant and its connections; but respondents do not admit that the same was done, or agreed to be done, at the mere request of said Reunion Committee, but, on the contrary thereof, they aver and charge that such so-called "special excursion" rates were made or will be made purely for profit to said complainant and its connections and to enrich their corporate coffers, and through no motives of benevolence or patriotism. Respondents are informed and believe that said proposed reduction from the regular one-way rates charged by complainant and its connecting lines, and other railways coming into the City of New Orleans, involve a reduction to about one-third of the regular fare—that is to say, a charge of one cent per mile instead of the rate of three cents per mile which is usually charged by said complainant and other railroads coming into the City of New Orleans, whenever such railways are not forced by competition, or dull times or dearth of travel to reduce such rates below 3 cents per mile.

Respondents further admit that the complainant and its connections have arranged to put in force the so-called special reduced rates, and to issue round-trip excursion tickets to all those who desire to attend said United Confederate Veterans' Reunion at New Orleans; and they aver that complainant and its connections, and all of the railroads in the United States, upon all occasions of expositions, reunions whether Grand Army or Confederate, and conventions whether Democratic or Republican, as well as all other expected and proposed large gatherings of people, are accustomed to and for many years past have been engaged in the business of making and arranging for such reduced rates; and that such is done by said complainant and all other railroads in the United States, for the mere purpose of corporate profit.

Respondents do not deny that at all competitive points, complainants and all other railroads normally and usually reduce their rates to less than three cents per mile, in order to meet competi-
23 tion, if any, by a shorter line and consequent saving in time.

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IV.

Respondents admit that the form of the ticket usually provided by complainant and its connections whenever it makes so-called reduced rates or excursion rates is substantially the form set out and described in paragraph VI of the bill of complaint; that said form of ticket purports to contain certain conditions, and purports, by the terms thereof, to be signed by the original purchaser; that said form of ticket purports and pretends to be non-transferable and to be conditioned that if presented by other than the original purchaser, who is supposed to sign the same at the date purchased, it will not be honored, but will be forfeited, and said proposed ticket further pretends to be conditioned that any agent or conductor, on any of the lines over which it reads, shall have the right to take it up and cancel the entire ticket, both the going and return portions of it; and that the form of ticket, annexed to the bill of complaint as Exhibit A, is the proposed form of ticket to be issued by the complainant and its connections for persons along their lines desiring to attend the said reunion of the United Confederate Veterans. Respondents aver and charge, however, that the pretended and so-called conditions sought to be stamped upon the face of said tickets by said complainants and its connections are impracticable in fact and impossible of fulfillment, and are commonly and openly disregarded by the complainant and its connections, by the original purchasers of said tickets, and by the traveling public at large; that the said pretended terms and conditions so sought to be made by complainant and other railways, who issue said tickets, are unlawful and are utterly without consideration, for the reason that it can make no possible difference to complainant and other railways, when they issue and sell such tickets whether the original purchasers return thereon, or some person to whom such original purchasers may sell and transfer said tickets; that said tickets, when brought by persons desiring to travel thereon, are bought with the understanding that the railways selling such tickets are common carriers of passengers, and are compelled by law to carry all passengers upon the same terms and conditions and at the same rates; that the said complainant and the railways in the United States generally, recognize that such tickets are commonly dealt in by the traveling public, and that many thousands of such tickets are bought and sold openly every day in every
24 large city in the United States; and that in many, if not all cases, the railway companies of the United States knowingly allow ticket brokers, who have large acquaintanceships and large runs of custom at their offices, to sell for them and to openly deal in such tickets—but respondents aver and charge that, according to the averments of paragraph VII of said bill of complaint, the proposed reunion tickets will not be issued subject to any conditions requiring the original purchaser to sign the same or to identify himself in New Orleans, all of such conditions on said tickets being waived.

VII.

Respondents admit that the hope and expectation set forth in the seventh paragraph of said bill of complaint is well founded, and that

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upwards of one hundred thousand people will likely be transported by the various railways reaching the City of New Orleans to attend the aforesaid U. C. V. Reunion.

Respondents further admit that the large number of people to be carried by complainant and its connections, and other railroads, has rendered it necessary for complainant and its connections to issue tickets the return portions of which will not have to be signed by the original purchasers; that it is and will be impracticable to secure such signatures in time to enable the owners of such tickets to depart when desired; and that it is and would be a great inconvenience and source of annoyance and expense to the people, for whose benefit such tickets are ostensibly to be issued, to require such tickets to be signed by the original purchasers.

Respondents further admit that it is wholly impracticable to have return portions of said proposed tickets presented by the owner or holder thereof to any agent of the complainant in the City of New Orleans, for the identification of the original purchasers of such tickets; and respondents also admit that it is equally impracticable for the train conductors or collectors, while in the management of their trains, to identify the persons presenting such return portions of the proposed tickets, and at the same time give proper care and attention to the safety and welfare of such passengers and the operations of such trains. Respondents submit that the same state of facts is true in all cases of such excursions or round trip tickets; that it is always unnecessary and impracticable, and is a matter of no concern and no interest or importance whatever, to said railway companies, that the holder of a genuine, *bona fide* ticket, issued and sold by it and reading over its lines, is a person different from the original purchaser of said ticket; that in recognition of such annoyance, inconvenience and impossibility, and of the absurdity of such a regulation, the whole traveling public of the United States, and nearly all of the railways, including complainant and its connections, have wisely concluded to dispense with a senseless and useless and illegal formality; that in law and in fact there is no consideration moving said railway companies, including complainant and its connections, to sell tickets at a less rate than their usual fares, other than the inducement thus held out to large bodies of people to avail themselves of such cheap rates and that there is no consideration moving from or to the purchaser except the temptation or desire to obtain a cheap rate; and that the recitals of said paragraph VII of the pretended grounds of equitable relief, are the desire assistance in complainant's business of the power of the Court to secure the injunctive process of this Court, so as to enable complainant and its connections to destroy fair competition and crush rivalry in its business as carrier and to economize in the operation of their roads, and to relieve them from the employment of a force sufficient to protect their pretended interests. And respondents accordingly submit that the said paragraph VII of the bill shows no equity on its face and shows that the complainant is not entitled in equity to the relief sought by the bill.

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VIII.

Respondents deny that the complainant and its connections consented to said proposed reductions in rates, and participated in the issuance of the form of ticket annexed to said bill of complaint, in reliance upon being protected from the so-called and falsely alleged fraudulent dealings of respondents in said tickets after the same shall have been issued; but, on the contrary thereof, respondents aver the fact to be that the complainant and its connections, and other railways coming into the City of New Orleans, have consented to put on said proposed excursion rates to said U. C. V. Reunion for no other purpose than the hope and expectation of profit to themselves in the sale of a large number of such tickets; and respondents show that the pretended charges of fraud set up in paragraph VIII of said bill of complaint, against these defendants, are false and untrue, to
26 the knowledge of complainant and its officers and servants.

Respondents aver and charge that the sole alleged fraud intended to be charged in said paragraph VIII against these respondents, is the expected re-sale by them, to persons in the City of New Orleans, of the return portions of said proposed tickets, as to which no signature of the original purchaser, and no identification of such purchaser, are required or expected by complainant and other railways under such form of ticket; and respondents show that the false charge of fraud so made against these respondents, is merely gratuitous, and that the effect thereof in said bill of complaint is simply to give color thereto.

IX.

Respondents admit that each of said respondents are separately engaged in the busines- of buying and selling the unused portions of railroad tickets, or what is commonly known as "ticket brokerage," a business that is and has been followed and pursued in all the large cities of the United States, for the past twenty-five or thirty years, a business which is recognized as lawful by the State of Louisiana, and the City of New Orleans, and which is licensed according to the laws of said state and city, the term "license" in the law of the State of Louisiana, meaning a tax upon a business which is recognized as lawful and legitimate.

Respondents further admit that, in accordance with the general custom of the trade, they separately buy and sell the return coupons of railway tickets, whether the same are stamped "non-transferable" or not, for the reason that the term "non-transferable" does not import any practical or legal meaning in the business, according to the common understanding of the railways themselves, the ticket brokers, and the traveling public to whom said tickets are issued, who freely sell them to brokers who in turn sell them to other persons desiring to use said tickets for transportation, when genuine and *bona fide*.

Respondents deny that they buy such tickets with the intention of putting them in the hands of persons who will use the same to secure passage on complainant's railway or other railways, by falsely impersonating the original purchasers or falsely and fraudulently

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signing such purchasers' names when such signatures are required, or falsely stating that such holders are the original purchasers; but, on the contrary thereof, respondents aver and show that the
27 tickets intended to be issued by said complainant, as plainly set out in paragraph VII of said bill of complaint, are not to be subject to such requirements, all of which pretended conditions are waived specially with reference to such tickets. Respondents further aver, upon information and belief, that such requirements, as hereinbefore set out, were waived upon said tickets by the complainant and other railways for the express purpose of making them more readily saleable, and of inducing persons to purchase the same, with the understanding that said tickets did not require the signatures of the original purchasers nor their subsequent identification in the City of New Orleans.

Respondents further aver and charge that, with such pretended requirements waived, by said complainant and other railways, there can be and is no possible fraud, imposition, detriment, loss or injury cast upon or to said complainant or other railways issuing such tickets.

Respondents do not deny that the complainant, on occasions of Mardi Gras festivals in the City of New Orleans, have joined in the issuing of reduced rates and the putting out of said so-called "non-transferable" tickets, but, as above set out, the general traveling public, the railways, and the ticket brokers, by common consent, by usage, and by understanding, have all treated said tickets as articles of property, and as negotiable and transferable to any person desiring to purchase and travel on the same when genuine and *bona fide;* and respondents deny that these respondents have ever fraudulently dealt in the return coupons of such tickets, or that complainant has ever been damaged in respect thereto, by any act of respondents.

X.

Respondents admit that it is their hope and expectation to buy and sell the return portions of said U. C. V. Reunion tickets, but they deny that they will solicit, induce, or persuade the holders thereof to sell such return portions to respondents upon any false or fraudulent pretense or representation upon the part of respondents.

Respondents admit that they, in common with the general public, have some knowledge of the character and terms of the proposed tickets; that they are informed and believe that such tickets will be issued at low rates, to induce and enable the traveling public to attend said reunion in large numbers; that respondents expect to offer the same for sale, if they shall acquire any of said tickets, and
28 will sell such tickets to persons other than the original purchasers, for such price as they are willing to pay; and that it is no concern of complainant or its connections, or other railways, whether respondents make a profit or a loss in the proposed dealing in said U. C. V. reunion tickets. Respondents again deny that they propose or intend or expect or will, by false or fraudulent representations, sell such tickets as transferable when same are not transfer-

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able, or that they will, by connivance with such proposed purchasers, induce or assist them to impersonate the original purchasers; but, on the contrary, thereof, respondents show that no such alleged chicanery or *or* evil practices will be necessary in order to sell said tickets, in the event respondents should buy any of the same, for the reason, as hereinbefore set out, that all of the conditions of alleged non-transferability, signature, and identification on said tickets, have been waived by the complainant and by other railways proposing to issue such form of tickets, as in the bill of complaint fully set out; and respondents further deny that trafficking in the tickets of complainant's road or of its connections, will operate to the prejudice or injury of said complainant, and aver that the charge in this paragraph of the bill of complaint is false, to the knowledge of complainant.

XI.

Respondents further specially deny that any loss, injury, or damage will come or can come upon complainant or its connections by reason of respondents' dealings in said proposed tickets; and they further specially deny that the complainant or its connections have ever suffered any loss, injury or damage by reason of persons using their tickets, whether the conditions of alleged non-transferability stated thereon are rigidly enforced by complainant, or waived, for the reason that the traveling public have for many years past continuously ridden on such tickets over complainant's railway, and it made no manner of difference to complainant whether the holders of such tickets, when genuine and *bona fide*, and the price of which have been put in the hands of complainant's agents, were the original purchasers thereof or not. Respondents reaver and reiterate that no consideration whatever, in law or in fact, inured to complainant, or moved from complainant or the original purchasers, to make said tickets non-transferable. And respondents aver, as a matter of law, that any such condition or stipulation inserted in such tickets is in violation of the act of Congress, known as the Interstate Commerce Law.

29 Respondents further aver that the only damage that can come upon the public by reason of the use of such tickets is by the unlawful act of complainant and its servants in ejecting passengers from its trains when riding on said tickets, if said passengers are not able to satisfy the conductors of such trains that they are the same persons, or as good as the same persons, who originally purchased said tickets.

XII.

Respondents deny that any additional burden is cast upon complainant's conductors and collectors by reason of any pretended fraud to be practiced upon them, in forcing such conductors and collectors to distinguish the rightful holders of said return portions of such tickets from the persons to whom respondents or their agents have sold the same; but, on the contrary thereof, respondents show that by the waiver by complainant and its connections of the so-called

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non-negotiable terms of said tickets, the said conductors and collectors will be required to assume, and if they do their duty, will assume and will be compelled to assume, that the persons holding or presenting tickets for passage on complainant's trains, when genuine and *bona fide,* are the true and lawful holders and owners of such tickets. Respondents deny that there will be any multiplicity of damage suits, or any errors made by such conductors or collectors, if such conductors and collectors carry out, as complainant has set out in its bill, the proposed and intended waiver of the so-called non-negotiable terms of such tickets.

Respondents further deny that the traveling public or complainant will be subjected to any interruption, delay or expense in the operation of trains, if the recognition of said proposed waiver is carried out by complainant's conductors and collectors; and respondents deny that the effect thereof will deter persons from using said tickets in traveling on said trains, but, on the contrary thereof, respondents aver the fact that complainant and its connections and associate railways have agreed to waive said absurd, illegal, and unreasonable conditions on said proposed tickets, will result in an enormous and ready sale of such tickets, and will operate to the great profit of said complainant and its connections, which tickets in many instances would not be saleable without the waiver of such regulations.

Respondents neither affirm -or deny the last clause in paragraph XII of complainant's bill, except this: that respondents emphatically deny that the complainant will be defrauded or can be defrauded by the purchase and use of said tickets by any one.

XIII.

Respondents are advised and so aver, that the complainant has an adequate remedy at law against all persons who actually defraud complainant or subject it to a loss or damage; but respondents aver that no such fraud, damage, or injury is contemplated or intended by these respondents, or any of them, or that any loss, damage, or injury can come upon complainant by reason of the expected dealing by respondents in the U. C. V. reunion tickets referred to in said bill of complaint.

Respondents deny that there can be any damage or injury to the business of complainant, in money or otherwise, by any expected or contemplated act of respondents; and respondents specially deny the charge that they are insolvent, but, on the contrary thereof, they jointly and severally assert and aver that they are all reputable and solvent persons and responsible citizens, able to pay any judgment for damages rendered against them.

Respondents specially deny that they intend or have in contemplation the practicing, directly or indirectly, of any frauds upon the said complainant or its connections; and they further specially deny that there is any necessity for any restraint or injunction to be issued against respondents by this Honorable Court.

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XIV.

Respondents admit that it is the custom and usage of complainant and its connections to issue railroad tickets at reduced rates to the traveling public on various occasions, such as expositions, conventions, Mardi Gras, reunions, or other public gatherings, and that the tickets which are usually issued by complainant purport by their terms to be non-transferable and to constitute a so-called "special contract" in express terms between complainant, the lines issuing the same, all other lines over which the same entitle the holders to travel, and the original purchasers of said tickets, whereby the said original purchasers are forced to agree that said tickets, shall not be transferred by them to any other persons; but respondents show that said tickets, when issued by complainant and its connecting lines and other railways, on such occasions of expositions, reunions,
31 conventions, Mardi Gras, and the like, are in practice and general consent and common understanding of the traveling public, the railways, and the ticket brokers, when *bona fide* and genuine tickets, good for the return passage over the lines of said complainant and its connections and other railways, in the hands of the holders thereof, whether such holders be the original purchasers or not; that such practice and such understanding are common and general all over the United States; that such tickets are sold and dealt in as legitimate business in every large city, to the knowledge of complainant, and such tickets are and have been for many years sold by complainant with full knowledge of the fact that they are in practice and general understanding of the traveling public, good in the hands of any holders.

XV.

Respondents jointly and severally admit that each of them are and have been for some time separately engaged in the lawful business of buying, selling, and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and transfer the same to respondents, with the intent and purpose that such tickets shall be used by the second purchaser thereof, but respondents deny that such use is a violation in law or in fact of the terms thereof. And respondents deny any knowledge that such use of said tickets by persons other than the original holders, is any fraud upon complainant or the railways issuing such tickets when the same are genuine and *bona fide*—and respondents again aver that it is a matter of no concern or interest to the complainant or the railways issuing such tickets, whether the original purchasers are the holders and presenters of the same, or whether the holder has purchased said ticket from the original purchaser, or whether such holder has purchased the same from a ticket broker, or whether, as frequently happens, one of such tickets is accidentally or otherwise exchanged for another of the same class and form.

XVI.

Respondents submit that paragraph XVI of the bill of complaint herein is tantamount in law to a threat by complainant that unless

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the Court shall grant the relief prayed for in the bill, complainant will cease or be unable hereafter to issue such tickets and
32 make such reduced rates. Respondents submit that the practice complained of has been going on, not only in the City of New Orleans, but in all the cities of the United States, for nearly thirty years, and that the complainant, its connections, and other railways have found it profitable to issue such tickets and to make such reduced rates, in spite of their full knowledge of the fact, that in a vast number of cases, the holders and presenters of such tickets are not the original purchasers thereof. Respondents further submit that said threat of complainant is a vain and idle threat, and can have no legal force or effect; that complainant, its connections, and other railways in the City of New Orleans made a similar threat to the Legislature of the State of Louisiana at the session of 1902, in order to induce said Legislature to enact a stringent statute prohibiting the business of ticket brokerage, that said Legislature of the State of Louisiana refused to heed said threat, and the complainant and the other railways have, nevertheless, found it profitable or advisable not to carry said threat into execution; that the declared public policy of the State of Louisiana, in the encouragement of legitimate business and enterprise, in the interest of the traveling public and to promote interstate travel and intercourse, has been for many years to abstain from placing any restriction or unreasonable conditions upon travel and the terms of travel by carriers doing business in this State; and that they have authorized and legalized by statute the business of dealing in railroad and steamship tickets by brokers and others; and that these respondents have, as aforesaid, duly paid all licenses, both State and city, demanded of them as such brokers.

Respondents further say that it is within their knowledge and therefore they aver the fact to be, that for at least the past ten years earnest efforts and appeals have been made to the Congress of the United States to secure legislation in the interest of the railroads and against ticket brokers, restraining and prohibiting them from dealing in railroad tickets or evidences of transportation on railways engaged in commerce between and among several States; and that, presumably in the interest of the traveling public, the attempted legislation failed; and your respondents therefore aver that the existing and deliberate policy of the national government is to recognize and to allow ticket brokers to operate, deal in, and dispose of tickets or evidences of transportation over and upon railroads engaged in interstate commerce.

Respondents further aver that when the war revenue tax
33 law was adopted by the United States, in order to defray the expense of the war with Spain, a tax was levied and collected by the government against your respondents for engaging in the business of ticket brokers, thus recognizing the lawfulness of said employment and business and practically licensing the same.

XVII.

Respondents jointly and severally, for answer to the seventeenth paragraph of said bill of complaint, say that said respondents,

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Bitterman and Kelsko, are members of the American Ticket Brokers' Association, a corporation created under the laws of the State of Kentucky; that the respondent, Mehlig, is a member of the Guarantee Ticket Brokers' Association, a corporate body under the laws of the State of —. Respondents deny that all ticket brokers are members of one or the other of said associations, but, on the contrary thereof, they aver that the said American Ticket Brokers' Association and the said Guarantee Ticket Brokers' Association are reputable bodies; that the members thereof, so far as respondents are advised, are reputable and responsible ticket brokers. Respondents have no knowledge of or connection with the National Ticket Brokers' Association, and disavow any responsibility for its actions, or for the actions of its members.

Respondents further deny that all ticket brokers act in concert in all of the matters as stated in the bill of complaint herein; but, on the contrary thereof, so far as respondents are advised each association has concern only with its own members and respondents aver that there is no combination, confederation, or conspiracy between the said ticket brokers, or between these respondents and the other defendants named in the bill, or between the members of the associations named in this paragraph of the answer, to do any unlawful thing or to act in any manner unlawfully or prejudicially to the interest of complainant or its connections. Respondents deny that it is the purpose or aim, or that it is the custom and practice of said associations, to maintain respondents in any unlawful business or to aid them in any fraudulent or dishonest schemes. Respondents deny that they are engaged, or have ever been engaged, in the conduct of their business as aforesaid, in any unlawful or dishonest scheme of combination, confederation, or conspiracy; but they aver that the objects of the aforesaid associations are lawful;

34 that the ticket brokers, members of said associations, exchange information and are useful adjuncts to the traveling public in extending facilities in affording information as to rates, schedules of trains and in handling tickets lawfully acquired by the members of said associations.

Respondents aver that it is true that all lawful contracts made by the respondents named in this answer, and all tickets sold by them, are guaranteed by the ticket brokers' associations to which they respectively belong; and that said guarantee serves as an additional security to the traveling public and as a voucher for the responsibility and reputability of the ticket brokers who are members of said associations.

Respondents attach hereto and make part hereof, as Exhibit A to this answer, the constitution and by-laws of each of said associations to which they respectively belong, and which is annexed and made part hereof as fully as if the same were copied *in extenso* herein.

XVIII.

Respondents deny that the nature of the business of all ticket brokers, and their methods of conducting the same, are alike, or

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that all of such brokers make use of fraudulent devices and misrepresentations; but, on the contrary thereof, these respondents aver that they are reputable ticket brokers, and that their business is lawful and legalized by the statute law of the State of Louisiana and by the common sufferance of the general public; that the tickets handled by them are bought and sold by all classes of people in the community, by clergymen, doctors, lawyers, merchants, business men, and ladies, and the traveling public generally, to the knowledge of the complainant; and respondents emphatically and under oath deny that they are in any combination or conspiracy to defraud railway companies by inducing, persuading, or misleading the traveling public to sell or buy non-transferable ticket contracts, or otherwise.

Respondents are not advised whether injunctive relief similar to the relief prayed for in the bill of complaint herein, has been accorded to the railway companies by courts sitting in other cities and States of this country; but respondents aver that if such injunctive relief has been granted in any case, it has been so granted only in instances of actual fraud and deception, intended or threatened, and in cases of actual losses inflicted or intended or threatened to be inflicted upon railway companies; but respondents deny that any fraud is contemplated or intended by these respondents against complainant, or that any loss or damage can come upon or be sustained by it in the event your Honors should deny the relief sought for by the bill.

Respondents deny that they have ever sought to evade any of such injunctions when issued, by ostensibly assigning their business to some other broker not named in the order of court; but, on the contrary, these respondents have always maintained their right to pursue their lawful calling and business; and that no injunction *pendente lite* has ever been issued against these respondents or either of them, by any Court in the United States.

Respondents are unable to answer the charge in paragraph XVIII of said bill of complaint, to the effect that numbers of "scalpers" from other places emigrate to the city where the injunction has been granted and seek to engage in the same business and thus render valueless the process and orders of the Court. Respondents aver and show that if such charge be true, these respondents are in no wise responsible or answerable therefor; that respondents and each of them named in this answer are reputable resident ticket brokers, doing business in the City of New Orleans for ten years and more, and they never have been migratory or wandering "scalpers;" that respondents are unable to answer for, and do not undertake to answer for, the other defendants named in the bill of complaint, who are not members of respondents' associations, so far as these respondents are advised, and who have no connection or concern with respondents, but who, on the contrary, are if engaged in the ticket brokerage business their rivals and competitors in business.

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XIX.

Respondents deny that the amount involved in this controversy, exclusive of interest and costs, exceeds the sum of five thousand dollars, or any sum whatever; but, on the contrary thereof, respondents show that the complainants have nothing *to* at stake and no interests to protect, and are entitled to no relief whatever in this suit as against respondents; and that no harm, damage, or injury can come upon complainant by reason of the refusal of your Honors to grant the relief in the bill of complaint prayed for—and respondents show that all of the damage that it is pretended that complainant will sustain by reason of the doing by respondents of the matters and things charged in the bill, are *damnum absque injuria* or *injuria sine damno.*

36

XX.

Respondents, further answering, aver that they are in the exercise of a legitimate and lawful business as ticket brokers, and of their occupation and the exercise thereof they cannot be deprived without due process of law; and that to restrain them from the exercise of the right to pursue a lawful business would be violative of the fundamental law of the State of Louisiana and of Article — of the Constitution of the United States.

XXI.

Respondents, for further answer to the bill of complaint herein, upon information and belief aver that at all times in said bill of complaint mentioned, the complainant, the Louisville & Nashville Railroad Company, and its connecting carriers as recited in said bill and the Illinois Central Railroad, the Yazoo and Mississippi Valley Railroad, the New Orleans and Northeastern Railroad, The Southern Railway, the Mobile and Ohio Railway and the Alabama Great Southern Railway, and the Texas and Pacific Railway Company and divers other railway companies (whose names and more particular descriptions are presently unknown to respondents), were each and all of them, and each and all of them now are, transportation companies, stock and railroad corporations, having lines of railroads engaged in the business of transporting persons and property for hire, not only between other points in the State of Louisiana, and the City of New Orleans, but also between various points, cities, and towns in the State of Louisiana, without the State of Louisiana and in other States than the State of Louisiana and the City of New Orleans; that before the commencement of this action and at the time of the commencement thereof, the said complainant and the said other railroad corporations being engaged in said business as common carriers as aforesaid, unlawfully combined, confederated, and conspired together, and one with the other, and still continue to unlawfully combine, confederate, and conspire together, to restrain trade and commerce, not only within the State of Louisiana, but among the several States, and to monopolize part of the trade and commerce among the several States and within the State of Louisiana by fixing and maintaining non-competitive rates

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for the transportation of persons and property over their respective lines of railway to and from said City of New Orleans and
37 said points, cities, and towns in other States and within the State of Louisiana; and in pursuance and in furtherance of their said unlawful combination, confederation, and conspiracy, did associate themselves in a passenger association or pool, and did establish, fix, and maintain certain uniform rates for passage to and from the said City of New Orleans and said other cities and towns as aforesaid; and did unlawfully pool and arrange to divide ratably between themselves, according to their corrupt and unlawful agreement to avoid competition and to restrain trade and commerce among the several States, the earnings of said respective lines of railway for passage to and from the City of New Orleans as aforesaid, and have established and are in the act of maintaining a joint ticket agency in the Theatre Arcade in the City of New Orleans, in charge of Joseph Richardson, the special agent and representative of said railroads connecting with complainant herein and who constitute the Southeastern Passenger Association and who are members of said association, with a branch of said association in New Orleans known as the New Orleans Passenger Bureau, authorizing said agent, on behalf of all the members of said Southeastern Passenger Association, including complainants, to extend the return tickets issued by the various companies members of said association, and the railways connecting with complainant herein, the tickets issued by complainant and by the connecting carriers being, as your respondent is informed, advised and believe, and so aver the fact to be, uniform in terms and conditions, as the result of agreement and understanding both as to the form and substance as well as the price of transportation, and this for the purpose of preventing competition between the various roads entering into the City of New Orleans, who would otherwise naturally compete with each other for the transportation aforesaid; that the said complainant and its connecting lines did agree among themselves not to issue, and have refrained from issuing, and still refrain from issuing and selling any other ticket in any form than that mentioned and set forth in the bill herein, for the same rate of fare.

Your respondents further allege, upon information and belief, that each and every of the tickets for passage mentioned and described in the bill of complainant, the use and sale of which by any person other than the original purchaser, is sought to be restrained by injunction in this action, will be issued for sale and sold by said complainant upon the terms and conditions and
38 in the manner and form set out in said bill of complaint, in pursuance of the aforesaid unlawful combination, confederation and conspiracy to monopolize and restrain trade and commerce, contrary to the terms and provisions of the Act of Congress of the United States entitled "An Act to protect trade and commerce against unlawful restraint and monopolies," approved July 2nd, 1890, and in disregard and violation of the Act of Congress approved February 4th, 1887, known as the Interstate Commerce

Law, and contrary to the provisions of the statute laws of the State of Louisiana in such cases made and provided.

XXII.

Respondents, for further answer to the bill of complaint herein, aver and say that they are advised, informed and believe, and so charge the fact to be, that the bill of complaint herein filed on behalf of the Louisville & Nashville Railroad Company is the result of an illegal agreement and understanding had between various railroads composing the Southeastern Passenger Association and the Trans-Continental Passenger Association, and is in furtherance of the combination, confederation and conspiracy organized and existing between those composing the associations aforesaid, for the purpose of controlling, at fixed prices, without regard to the public's interest, the cost, price and terms of transportation, and so as to defeat competition between rival carriers, some of whom are members of the association aforesaid, and are participating in the conspiracy herein charged; that as appears by the bills on file in this Court, presented at the same time for the Court's consideration, it is manifest that the invocation of this Court's power is in furtherance of a combined effort on the part of the various companies organized under the name either of the Southeastern Passenger Association, or the Trans-Continental Passenger Association, to take advantage of the public and those patronizing their lines, and to deprive them of the benefits and advantages of the contracts into which they have entered, and to seek and despoil them of their property, and thus, by breaking down opposition, to enrich the complainant and its co-confederates.

XXIII.

Your respondents, for further answer to the bill of complaint and the relief sought herein, say that they are advised, informed and believe, and so aver the fact to be, that the complain-
39 ant and its co-confederates, members of the Southeastern Passenger Association, in order to escape from the operation of the statutes of the United States, construed and interpreted by the Supreme Court of the United States in the case of the United States *vs.* Trans-Missouri Freight Association, and the U. S. *vs.* Joint Traffic Asso., organized the association hereinbefore referred to and clandestinely held their meetings, the various companies having their representatives present, authorized to sit and act in their behalf, and there agree upon the rates for passenger traffic, whether for an unlimited or limited time, whether regular or excursion rates, and to fix, agree upon and determine the terms, price and form of the ticket and the conditions of such transportation, obligating themselves either expressly or by implication, under such penalties as they may inflict upon those violating said agreement, to the observance of all the conditions imposed upon the various members of said associations in the transportation of passengers; and thus all lines of railway paralleling or running from a common point to a common point, have a uniform charge and

rate for transportation, whether regular or excursion tickets; and that their conduct in this respect, and their acts and doings, are clandestine and in defiance of the laws of the United States regulating interstate commerce and prohibiting restraints and monopolies.

These respondents further aver, by way of specification of said charge, that the New Orleans Passenger Bureau, the local representative of the Southeastern Passenger Association, and of which bureau the complainant herein is a member (the said bureau being sometimes called the Auxiliary Bureau) has repeatedly, and openly, and defiantly, set at naught the statutes of the United States hereinbefore referred to, and more particularly on March 10th, 1902, when the said Southeastern Passenger Association, through the New Orleans Passenger Bureau, issued its circular to the members of said bureau, including the complainant and the other railways entering the City of New Orleans, allowing and permitting a certain class of persons to travel from New Orleans to Memphis, to St. Louis, to Little Rock, to Nashville, to Louisville, to Cincinnati, and to Washington, between certain dates, at rates less than those published and advertised to be charged the general public; and that in the issuance of said circular, directions were given by the secretary of the said New Orleans Passenger Bureau that the rates therein recited were "not to be advertised," but that the fact was to be concealed from the traveling public, and this defiance of the Interstate Commerce Law--all of which will more fully and at large appear by reference to a copy of the circular issued under date of March 10th, 1902, hereto annexed and made part hereof as Exhibit X

Your respondents further say that they are advised, informed, believe and so charge the fact to be, that the complainant herein, in common with its co-confederates, has in the recent past maintained traffic arrangements and deals with ticket brokers other than those agents employed by the companies direct as their representatives, guaranteeing said ticket brokers, so engaged, against loss in consequence of trafficking in tickets over their various lines, and this to insure a measure of patronage and travel which they would not enjoy, in consequence of active competition, except through the intervention, aid and assistance of those of whom they presently complain; that your respondent, Kelsko, has had and maintained, through the general passenger agent and the division passenger agent of the complainant, traffic arrangements for the sale and disposition of the tickets of said Louisville & Nashville Railroad Co., the complainant herein, and that same inured to the benefit, advantage and profit of said Louisville & Nashville Railroad Company; that said Kelsko has likewise had and maintained substantially the same relations with the Illinois Central R. R. Co. and the Queen & Crescent System of railways; that your respondent, Mehlig, has had and maintained substantially the same relations and for the same purpose, with the Illinois Central and Queen & Crescent Railways; and that your respondent, Bitterman, has also had and maintained substantially the same relations and has sold tickets for and accounted to the said Illinois Central and Queen & Crescent Railways and other railways and

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systems, all of said railway companies being members of either the Southeastern Passenger Association or the Trans-Continental Passenger Association. And respondents charge that this combination, confederation and conspiracy of the complainant and its associates of the Southeastern Passenger Association, to prevent respondents from continuing their legitimate business, is in order to enable said complainant and its associates to deprive these respondents of the right to follow a legitimate and lawful occupation and business, and so as to enrich themselves at the expense of these respondents; and respondents aver and say that the said complainant and its co-confederates, being in a common conspiracy to violate the law and oppress the public are not entitled to consideration or to equitable relief.

41 These defendants pray the same advantage of this their aforesaid answer as if they had pleaded the several matters and things aforesaid where a plea had been proper, or as if on account thereof they had demurred to said bill, or the parts thereof where a demurrer would have been proper; and these defendants deny that the complainant is entitled to relief, or any part thereof, in the said bill of complaint demanded; without this, that there is any other matter, cause or thing in the said bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge and belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct; and they humbly pray to be hence dismissed with their reasonable costs and charges on this behalf most wrongfully sustained.

N. O. May 14/03.

(Signed) HENRY L. LAZARUS,
GIRAULT FARRAR,
JAMES O'CONNOR,
Solicitors for Respondents.

STATE OF LOUISIANA, *Parish of Orleans:*

Charles T. Kelsko, being duly sworn, deposes and says that he has read the foregoing answer to the bill of complaint filed herein, and knows the contents thereof; that all matters of fact averred herein, of his own knowledge, are true, and those averred to be on information and belief, he believes to be true.

(Signed) C. T. KELSKO.

Sworn to and subscribed before me, this 14th day of May, 1903.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

STATE OF LOUISIANA, *Parish of Orleans:*

Julius Mehlig, being duly sworn, deposes and says that he has read the foregoing answer to the bill of complaint filed herein, and knows the contents thereof; that all matters of fact averred herein of

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his own knowledge, are true, and those averred to be on information and belief, he believes to be true.

(Signed) JULIUS MEHLIG.

42 Sworn to and subscribed before me, this 14th day of May, 1903.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

STATE OF LOUISIANA, *Parish of Orleans:*

Marcus K. Bitterman, being duly sworn, deposes and says that he has read the foregoing answer to the bill of complaint filed herein, and knows the contents thereof; that all matters of fact averred herein of his own knowledge, are true, and those averred to be on information and belief, he believes to be true.

(Signed) M. K. BITTERMAN.

Sworn to and subscribed to before me, this 14th day of May, 1903.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

Statement of Counsel as to Desire to Have Answer Taken as Filed in Cases Nos. 13,167 *and* 13,169.

Extract from the Minutes of Friday, May 15, 1903.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

No. 13167.

TEXAS & NEW ORLEANS R. R. Co.
vs.
SAME.

No. 13169.

ILLINOIS CENTRAL R. R. Co.
vs.
SAME.

At the hearing in open Court of the above causes upon the applications for preliminary injunctions, counsel for the various defendants whose names are signed to the answer filed in No. 13,166 stated that they desired said answer to be taken as having been filed in each of above causes Nos. 13,167, Texas & New Orleans R. R. Co. *vs.* Marcus K. Bitterman, *et al.*, and No. 13,169, Illinois Central R. R. Co. *vs.* Marcus K. Bitterman, *et als.*

43 *Hearing and Submission of Application for Injunction.*

Extract from the Minutes, April Term, 1903.

NEW ORLEANS, *Friday, May* 15, 1903.

Court met pursuant to adjournment:
Present: Hon. Aleck Boarman, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

No. 13167.

TEXAS & NEW ORLEANS R. R. Co.
vs.
SAME.

These causes as continued from yesterday came on this day to be further heard upon the applications of the complainants for a preliminary injunction and were argued by counsel, and submitted, when the Court took time to consider.

Decree.

Entered and Filed May 16, 1903.

United States Circuit Court, Eastern District of Louisiana, Sitting at New Orleans, La.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

In the Matter of the Rule herein Taken by Complainant on the Defendants for Preliminary Injunction.

On this 16th day of May, 1903, came on for further hearing the application of complainant for a preliminary injunction, and the Court, after hearing counsel for complainant and counsel for defendants, Marcus K. Bitterman, Charles T. Kelsso and Julius Mehlig, the other defendants who were served not being represented by counsel and not making any appearance, having considered the sworn
44 allegations of the bill and of the answer, and being sufficiently advised in the premises and being of the opinion that complainant is entitled to a preliminary injunction as prayed for:

It is ordered, adjudged and decreed that a writ of injunction be issued out of and under the seal of this Court, addressed to Marcus K. Bitterman, Julius Mehlig, Charles T. Kelsko, David Pike, George H. Johnson, G. F. Young and J. G. Finney and each of them, and to their or his agents, servants, employés, assigns, successor and successors, and all others acting for said defendants, or any or either of them, and all other persons whomsoever, restraining, enjoining and inhibiting them, and each of them, his or their agents, servants, employés, assigns, successor and successors, and all others acting for them, or any or either of them, and all persons whomsoever though not named herein from and after the time when they severally have knowledge of the issuance of the injunction herein, from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupon or unused portion thereof, issued by complainant, the Louisville and Nashville Railroad Company, or by any other road company for use over complainant's lines of railway, or any part of them, for use on the occasion of the United Confederate Veterans Reunion at New Orleans in May, 1903, which, by the terms thereof, are non-transferable or from soliciting, advising, encouraging or procuring any person other than the original purchasers of said tickets to use or attempt to use said tickets for passage on any train or trains of complainant; this injunction to continue in force during the pendency of this suit or until further orders of this Court.

Dated at New Orleans, Louisiana, in the Eastern District of Louisiana, this 16 day of May, 1903.

(Signed) ALECK BOARMAN, *Judge.*

45 *Injunction to Marcus K. Bitterman, Julius Mehlig, David Pike, Charles T. Kelsko, George H. Johnson, G. F. Young and J. G. Finney, May,* 1903.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

No. 13166.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

MARCUS K. BITTERMAN, JULIUS MEGLIG, DAVID PIKE, CHARLES T. KELSKO, GEORGE H. JOHNSON, G. F. YOUNG and J. G. FINNEY.

The President of the United States of America to Marcus K. Bitterman, Julius Mehlig, David Pike, Charles T. Kelsko, George H. Johnson, G. F. Young, J. G. Finney, and each of them and their agents, servants, employés, assigns, successor and successors, and all others acting for them, or any or either of them, and all persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the issuance of this injunction, Greeting:

Whereas, it has been represented unto us in our said Circuit Court on the part of the Louisville and Nashville Railroad Com-

pany in a bill of equity lately exhibited against you and each one of you touching certain matters and things therein set forth.

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said Marcus K. Bitterman, Julius Mehlig, Charles T. Kelsko, David Pike, George H. Johnson, G. F. Young and J. G. Finney, your attorneys and each of you, are hereby commanded and strictly enjoined under the penalty of the law, that you absolutely refrain and desist from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupon or unused portion thereof, issued by complainant, the Louisville and Nashville Railroad Company, or by any other railroad company for use over complainant's lines of railway, or any part of them, for use on the occasion of the United Confederate Veterans Reunion at New Orleans in May, 1903, which, by the terms thereof, are not transferable, or from soliciting,
46 advising, encouraging or procuring any person other than the original purchasers of said tickets to use or attempt to use said tickets for passage on any train or trains of complainant and that you remain so inhibited and enjoined until the further order of our said Court in the premises.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New Orleans, this 16th day of May, in the year of our Lord, 1903.

[SEAL.] (Signed) H. J. CARTER, *Clerk.*

Marshal's Return.

Filed May 18, 1903.

Received by U. S. Marshal, New Orleans, La., May 16th, 1903, and on the same day, month and year I served copy hereof on the following named parties in the City of New Orleans, La., in the manner following, to-wit:

Marcus K. Bitterman, by leaving the same at his office in the hands of his agent and clerk S. W. Fuller, the said Marcus K. Bitterman being absent from his office at the time of said service; Charles T. Kelsko, by handing the same to him in person; David Pike, by handing the same to him in person; F. W. Young, by handing the same to him in person; Julius Mehlig, by leaving the same at his office in the hands of his clerk and agent, Frank Roth, the said Julius Mehlig being absent from his said office at the time of said service.

CHAS. FONTELIEU,
U. S. Marshal,

(Signed) By T. I. GALBRITH,
Deputy U. S. Marshal.

Rule on Complainant to Show Cause.

Filed May 18, 1903.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

No. —.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

47 On motion of Henry L. Lazarus, Girault Farrar, and James O'Connor, of counsel for respondents, and on suggesting to the Court that upon the bills filed in the above numbered and entitled cause, and after hearing, this Honorable Court directed a temporary injunction to issue against Marcus K. Bitterman, Charles T. Kelsko and Julius Mehlig.

And on further suggesting to the Court that the temporary injunction issued herein, restraining appearers, the said Bitterman, Kelsko and Mehlig, from dealing, in the manner indicated in the Court's order, in what are known as signed non-transferable United Confederate Veteran's Reunion tickets, will operate to their great damage and injury, and entail upon them heavy loss.

And on further suggesting to the Court that complainant is a non-resident corporation; that movers ought not to be subjected to loss and expense in prosecuting said complaint in other jurisdiction, in the event it should be held that the preliminary injunction in this case was wrongfully obtained and issued; that movers should be in a measure protected by proper indemnification for losses sustained and injury suffered, in the event that said preliminary injunction should upon final hearing be vacated and set aside; and that a bond for a reasonable amount should be exacted of said complainant in order to maintain the present preliminary injunction, or, in default of complainant giving said bond in such sum as the Court may deem meet and proper to indemnify movers, the said temporary injunction should be vacated and set aside.

It is ordered that complainant show cause, at eleven o'clock A. M., on this 18th day of May, 1903, why it should not give good and sufficient security, in a sum to be fixed by this Court, to indemnify and hold harmless from all loss and damage that may be sustained or inflicted, the said Bitterman, Kelsko and Mehlig, in consequence of the issuance of the said temporary injunction herein on the 15th day of May, 1903; or why, in default of furnishing such bond, conditioned to indemnify the said Bitterman, the said Kelsko, and the said Mehlig, for all losses, damages and injuries that may be inflicted upon or sustained by said Bitterman, Kelsko and Mehlig, the said temporary injunction issued herein should not be annulled, vacated, set aside, and for naught esteemed and held.

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48 *Order as to Bond.*

Filed May 18th, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

In the above entitled cause, a preliminary injunction having been issued on May 16th, 1903, restraining the defendants, and each of them, as therein stated, and counsel for defendants, Marcus K. Bitterman, Charles T. Kelsko and Julius Mehlig, having applied to the Court for an order directing complainant to give a bond with one good and sufficient surety in the penal sum of — dollars to secure the said above named defendants individually against all loss or damages which may result from the issue of the said preliminary injunction, if it should be finally determined that the same was improperly issued.

Now, therefore, it is ordered that the said complainant do give a bond to the said defendants, Bitterman, Mehlig and Kelsko, with good and sufficient surety in the penal sum of five thousand dollars ($5,000.00) each to secure them and each of them against all costs and damages which may be awarded to them in case said order shall be finally determined to have been improperly granted.

New Orleans, May 18th, 1903.

(Signed) ALECK BOARMAN, *Judge.*

Indemnity Bond.

Filed May 18, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

Know all men by these presents, that we, the Louisville and Nashville Railroad Company, as principal, and R. M.
49 Walmsley, as surety, parties of the first part, are held and firmly bound unto said Marcus K. Bitterman, Charles T. Kelsko and Julius Mehlig, defendants in the above entitled action, and each of them, parties of the second part, in the just and full sum of five thousand dollars ($5,000.00), for the payment of which,

LOSE IN CENTER

well and truly to be made, we do hereby jointly and severally bind ourselves, and each of our successors, heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 18th day of May, in the year of our Lord one thousand nine hundred and three.

Upon the conditions as follows:

Whereas the said Louisville and Nashville Railroad Company has commenced its certain suit against the above named parties defendants, in the Circuit Court of the United States in and for the Eastern District of Louisiana, and therein prayed for an injunction against defendants pending the trial of said suit; and whereas the Honorable Aleck Boarman, holding said Court, has granted said prayer for said preliminary injunction and has ordered that said complainant shall cause to be executed a good and sufficient bond to the defendants for the sum of five thousand dollars ($5,000.00) to secure them and each of them against all costs and damages which may be awarded to them and each of them in case said order shall be finally determined to have been improperly granted.

Now, therefore, if the said Louisville and Nashville Railroad Company shall well and truly pay to said defendants and each of them all costs and damages which may be awarded to them, or any of them, in case said Court shall finally determine that said order was improperly granted, not exceeding the said sum of five thousand dollars ($5,000.00), then this obligation to be null and void; otherwise to be and remain in full force and effect.

Witness our hands and seals this 18th day of May, A. D. 1903.

(Signed) THE LOUISVILLE AND NASHVILLE R. R. CO.,
By CHAS. MARSHALL, *Superintendent.*
(Signed) R. M. WALMSLEY.

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

Robert M. Walmsley, being first duly sworn according to law, deposes and says: I am the same person whose name is subscribed to the foregoing bond as the surety therein, and I state that I am worth the sum specified as the penalty thereof over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

(Signed) R. M. WALMSLEY.

Subscribed and sworn to before me this 18th day of May, 1903.

[SEAL.] (Signed) H. J. CARTER,
U. S. Commissioner.

Rule on David Pike for Contempt.

Filed May 20, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

On motion of Denegre, Blair and Denegre, solicitors for the Louisville and Nashville Railroad Company, complainant herein, and on suggesting to the Court that on the 16th day of May, 1903, a preliminary injunction was issued in this cause, prohibiting the defendants herein, including one David Pike, and each of them, their servants, agents, employés, assigns, successor and successors, and all others acting for them, or any or either of them, and all persons whomsoever, though not named therein, from and after the time when they severally have knowledge of the issuance of this injunction, from buying, selling, dealing in or soliciting the purchase of any ticket or tickets, or the return coupon or unused portion thereof, issued by complainant, the Louisville and Nashville Railroad Company, or by any other railroad company, for use over complainant's lines of railway, or any part thereof, for use on the occasion of the United Confederate Veterans' Reunion at New Orleans in May, 1903, which by the terms and conditions thereof, are non-transferable, or from soliciting, advising, encouraging or procuring any person other than the original purchasers of said tickets to use or attempt to use said tickets for passage on any train or trains of complainant.

And on further suggesting to the Court that David Pike,
51 one of the defendants herein, who resides in the City of New Orleans and within this district, is in contempt of said injunction order and has violated its terms and conditions in this, to-wit: That on the afternoon of Tuesday, May 19th, 1903, the said David Pike did sell to one, A. Deneke, the unused portion of one of said non-transferable tickets issued by complainant for use on the occasion of the United Confederate Veterans' Reunion at New Orleans in May, 1903, namely, a ticket which had been sold to one George H. Gray and signed by him; that the said David Pike, his servants, agents and employés, at No. 619 Canal street in this city, are dealing in said non-transferable United Confederate Veterans' Reunion tickets and buying and selling the same in open and flagrant disregard of the said injunction and in disobedience of its terms, and in contempt of the orders of this Court.

That annexed hereto as part hereof is the ticket referred to in the foregoing motion, and the affidavit of A. Deneke, made before William Renaudin, notary public.

It is ordered that the said David Pike do show cause on the 20 day of May, at 2 P. M. o'clock, why he should not be attached, taken into custody and punished for contempt, disregard and disobedience to the orders and authority of this Court.

(Signed) ALECK BOARMAN, *Judge.*

Marshal's Return on Rule Taken on David Pike for Contempt.

Filed May 20, 1903.

On May 20th, 1903, I served copy hereof on David Pike by handing the same to him in person, in New Orleans, La.

CHAS. FONTELIEU,
U. S. Marshal,

(Signed) By T. I. GALBRITH,
Deputy U. S. Marshal.

Ticket issued by Louisville & Nashville R. R. Company account U. C. V. Reunion, 1903, signed "Geo. H. Gray." (Original Purchaser.) Filed May 20, 1903, with Rule for Contempt against David Pike.

NOTE.—To be transmitted in the original with this transcript as per stipulation at page 209 of said transcript.

52 *Affidavit of A. Deneke.*

Filed May 20, 1903, with Rule for Contempt against David Pike.

STATE OF LOUISIANA, *Parish of Orleans:*

Before me, William Renaudin, a notary public in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, this day personally came and appeared A. Deneke, who, being by me duly sworn according to law, deposes and says that his name is A. Deneke; that he purchased from David Pike a certain railroad ticket over Louisville & Nashville R. R., to Mobile, Alabama, which ticket was owned by Geo. H. Gray and is numbered 10,836; and affiant further says that he is now the *bona fide* owner of said ticket, having paid $2.50 therefor to said David Pike.

(Signed) A. DENEKE.

Sworn to and subscribed before me this 19th day of May, 1903.

(Signed) WILLIAM RENAUDIN,
[SEAL.] *Notary Public.*

Hearing and Continuance of Rule for Contempt Against David Pike and Order to Give Recognizance.

(Extract from Minutes.)

NEW ORLEANS, WEDNESDAY, *May* 20, 1903.

Court met, pursuant to adjournment.
Present: Hon. Aleck Boarman, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

The rule for contempt herein taken on May 20, 1903, by the complainant against David Pike came on this day to be heard.
Present: Denegre, Blair & Denegre, Attorneys for Complainants in Rule;
53 Ambrose Smith for David Pike, Defendant in Rule, and the Defendant, David Pike, in person.
Whereupon, after hearing evidence and testimony in part, it was ordered, on motion of attorney for defendant in rule, that the further hearing of the matter be postponed until to-morrow at 10 a. m.
It is further ordered that the defendant, David Pike, be released in his own recognizance in the sum of five hundred dollars ($500.00), to appear to-morrow at 10 a. m.

Recognizance of David Pike.

(Extract from Recognizance Book.)

UNITED STATES OF AMERICA, *Eastern District of Louisiana, ss:*

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
M. K. BITTERMAN ET ALS.

At a stated session of the Circuit Court of the United States held in and for the Eastern District of Louisiana, at the City of New Orleans, in the State of Louisiana, on the 20th day of May, in the year of our Lord one thousand, nine hundred and three, of the April term, A. D. 1903 thereof.
Present: The Honorable Aleck Boarman, one of the Judges of said Court. The following proceedings were had in the case of

No. 13166.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
M. K. BITTERMAN ET ALS.

Be it remembered, that on the said day personally appeared in open Court, David Pike, and acknowledged himself to owe and to be jointly and severally indebted unto the United States of America, the said David Pike, as principal in the above entitled and numbered cause, in the full sum of five hundred dollars, lawful money of the said United States, to be levied of their goods and chattels, lands and tenements, for the use of the said United States.

54 Upon the condition, nevertheless, that if the said David Pike shall be and appear before the said Court on Thursday, May 21, 1903, at 10 a. m., at and during the present term thereof, and from day to day thereof, and shall be and appear before the said Court at the next regular or special term thereof, on the first day thereof, and from day to day thereof, and from term to term thereafter, and shall respond to the rule for contempt duly found and presented against him and now on file, wherein he is charged with violating the writ of injunction issued May 16, 1903, in above cause, and shall abide the order and judgment of the said Court therein, and not depart from the Court without leave, then in that case this obligation is to be null and void, but otherwise to be in full force and effect; which proceedings were ordered by the Court to be entered of record, which is now here accordingly done.

—— ——, *Judge.*

Attest:
H. J. CARTER, *Clerk.*

Residence of principal, D. Pike: 745 Julia Street.

Injunction to Marcus K. Bitterman, Julius Mehlig, David Pike, Charles T. Kelsko, George H. Johnson, G. F. Young & J. G. Finney.

20th of May, 1903.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN, JULIUS MEHLIG, DAVID PIKE, CHARLES T. KELSKO, GEORGE H. JOHNSON, G. F. YOUNG and J. G. FINNEY.

55 The President of the United States of America to Marcus K. Bitterman, Julius Mehlig, David Pike, Charles T. Kelsko, George H. Johnson, G. F. Young, J. G. Finney, and each of them, and their or his agents, servants, employees, assigns, successor and successors, and all others acting for them, or any or either of them, and all persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the issuance of this injunction, Greeting:

Whereas, it has been represented unto us in our said Circuit Court, on the part of the Louisville & Nashville Railroad Company, in a bill of equity lately exhibited against you, and each one of you, touching certain matters and things therein set forth:

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said Marcus K. Bitterman, Julius Mehlig, David Pike, Charles T. Kelsko, George H. Johnson, G. F. Young and J. G. Finney, your attorneys and each of you, and your agents, servants, employees, assigns, successor and successors, and all others acting for you, or any or either of you, and all persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the issuance of this injunction, are hereby commanded and strictly enjoined, under the penalty of the law, that you absolutely refrain and desist from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupon or unused portion thereof, issued by complainant, the Louisville and Nashville Railroad Company, or by any other railroad company for use over complainant's lines of railway, or any part of them, for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903, which, by the terms thereof, are non-transferable; or from soliciting, advising, encouraging, or procuring any person other than the original purchasers of said tickets to use or attempt to use said tickets for passage on any train or trains of complainants, and that you remain so inhibited

and enjoined until the further order of our said Court in the premises.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New Orleans, this 20 day of May, in the year of our Lord, 1903.

(Signed) H. J. CARTER,
[SEAL.] *Clerk.*

56 *Marshal's Return.*

Filed May 29, 1903.

On the 23rd day of May, 1903, I served copy hereof on the following named parties in the City of New Orleans, La., in the manner following, to-wit:

G. E. McConnell, by handing the same to him in person.
M. Coriat, by handing the same to him in person.
W. E. Sugg, by handing the same to him in person.
F. J. Hawkins, by handing the same to him in person.
W. D. Green, by handing the same to him in person.
W. H. Stone, by handing the same to him in person.
M. Baum, by handing the same to him in person.
W. E. Pore, by handing the same to him in person.
S. Testard, by handing the same to him in person.

(Signed) CHAS. FONTELIEU,
U. S. Marshal.
By T. I. GALBRITH,
Deputy U. S. Marshal.

Answer of D. Pike to Rule for Contempt.

Filed May 21, 1903.

U. S. Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET ALS.

Now into this Honorable Court comes David Pike, made defendant herein in rule for contempt for violating the writ of injunction herein heretofore issued, and for answer and return thereto, respectfully represents:

That this respondent respectfully disavows and denies any purpose or intention to violate the mandate of this Honorable Court, or to show any the slightest disrespect therefor; or that he has violated the same or shown any disrespect therefor.

Further answering, respondent denies since the issuance of
57 this writ of injunction on May 16th, 1903, or service thereof May 19th, 1903, he, his agents, servants, employees, assigns, successors [successor] or successors, or any other person or persons acting for him or on his behalf, has or have engaged in the buying, selling, dealing in or soliciting the purchase or sale of any tickets or tickets, or the return coupon or unused portion thereof, issued by the complainant, the Louisville and Nashville Railroad Company, or any other railroad company for use over their line of railway, or any part thereof, for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, La., in May, 1903, which, by the terms thereof, are untransferable; or that he or others on his behalf, with his knowledge or consent, has or have solicited, advised, encouraged or procured any person other than the original purchaser of the said tickets to use or attempt to use said tickets for passage on any train or trains of complainants.

Respondent avers that, at the time of the service of the writ of injunction, he retired and withdrew from the business of railway broker, and has not been engaged therein since.

Further answering, respondent denies that on the 19th of May, 1903, as alleged by complainant, he, or any other person on his behalf, by or with his knowledge or consent, sold to one A. Deneke, the return coupon, or unused portion thereof, of the ticket issued by the Louisville & Nashville Railroad Company on the occasion of the United Confederate Veterans' Reunion at New Orleans, La., in May, 1903, which, by the terms thereof, were not transferable, and had been sold, as alleged by complainant, to one John H. Gray, and by him signed.

Wherefore, respondent prays that complainant's said rule for contempt be denied and dismissed, with costs, and for all general and equitable relief.

(Signed) D. PIKE.
(Signed) AMBROSE SMITH,
Solicitor for D. Pike.

David Pike, being first duly sworn, deposes and says that he is the respondent herein, and that all the facts and allegations in the above answer contained are true and correct.

(Signed) D. PIKE.

Sworn to and subscribed before me, this 21 day of May, 1903.

(Signed) H. J. CARTER,
U. S. Commissioner.

58 *Hearing of Rule for Contempt Against David Pike and Judgment Adjudging David Pike Guilty of Contempt.*

(Extract from Minutes.)

NEW ORLEANS, THURSDAY, *May* 21, 1903.

Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
MARCUS K. BITTERMAN ET AL.

The rule for contempt taken herein on May 20, 1903, against David Pike came on this day to be further heard, the defendant in rule, David Pike, and the counsel for the respective parties being present. After hearing further evidence and testimony, the matter was submitted the Court by the counsel for the parties.

Whereupon and in consideration thereof, the Court finds and adjudges the defendant, David Pike, to be guilty of wilful and unlawful contempt of the authority of this Court in the premises.

Card of American Cut Rate Ticket Office—"D. Pike, Manager."

Filed May 21, 1903.

NOTE.—To be transmitted in the original with this transcript, as per stipulation at page 209 hereof.

59 *Certified Copy of Affidavit of D. Pike, Manager of American Cut Rate Ticket Office.*

Taken Before Chas. B. Upton, Not. Pub. Offered by Complainant and Filed May 21, 1903.

STATE OF LOUISIANA, *Parish of Orleans, City of New Orleans:*

Office: No. 731 Lafayette Street; rear of City Hall.

Before me, Charles Bingay Upton, a notary public in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, personally came and appeared American Cut Rate Ticket Office, rep. by D. Pike, Manager, of this city, who, being duly sworn, deposes and says that he is carrying on in this city the business of retail tickets at No. — — Street; that his gross sales or receipts during the year 1903 amount to less than the sum of two thousand dollars.

(Signed) D. PIKE.

Sworn to and subscribed before me, this 14th day of March, 1903.

(Signed) CHAS. B. UPTON,
[SEAL.] *Notary Public.*

I certify that the above is a true copy of an affidavit made before me.

[SEAL.] (Signed) CHAS. B. UPTON, *Not. Pub.*

(Indorsed:) No. 13166. U. S. Circuit Court. Offered by Complt. & filed May 21, 1903. H. J. Carter, Clerk.

Judgment Against David Pike for Contempt.

(Extract from Minutes.)

NEW ORLEANS, THURSDAY, *May* 21, 1903.

Court met, pursuant to adjournment.
Present: Hon. Aleck Boarman, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
MARCUS K. BITTERMAN ET ALS.

The rule for contempt filed in this cause May 20, 1903, by
60 the complainant, against David Pike, having been heretofore tried, and the said defendant in rule, David Pike, having been found and adjudged to be guilty of wilful and unlawful contempt of the authority of this Court in the premises, and said David Pike, being this day present in Court, was called to the bar for sentence, and being asked by the Court if he had anything to say why sentence should not be pronounced against him, he failed to urge any reason good and sufficient in law.

Whereupon, it is considered and adjudged by the Court that the said defendant, David Pike, be confined in the Parish Prison for the Parish of Orleans, State of Louisiana, for the period of ten (10) days from and after this date, and that he pay a fine of one dollar ($1.00) and costs and stand committed till paid.

It is further ordered that the Marshal of the United States for this District do carry this sentence into effect forthwith.

Commitment of David Pike.

Filed May 30, 1903.

No. 13166 & 13169.

LOUISVILLE & NASHVILLE R. R. CO.; ILLINOIS CENTRAL R. R. CO.
vs.
MARCUS K. BITTERMAN ET ALS.

UNITED STATES OF AMERICA, *District of Louisiana, ss:*

To the Marshal of the District of Louisiana, or either of his Deputies, and the Keeper of either of the Gaols in said District, Greeting:

These are in the name of the President of the United States of America, to command you, the said Marshal or deputies, and each of you, forthwith to convey and deliver into the custody of the Keeper of the Parish Prison of the Parish of Orleans, State of Louisiana, the body of David Pike, adjudged guilty of wilful and unlawful contempt of the authority of this Court, by unlawfully violating the writ of injunction issued May 16, 1903, in the cases entitled Louisville & Nashville R. R. Co. *vs.* Marcus K. Bitterman *et als.*, No. 13166, and Illinois Central R. R. Co. *vs.* Marcus K. Bitterman *et als.*, No. 13169 of the docket of this Court, and sentenced to be confined in the said Parish Prison for the period of ten
61 (10) days from and after this date, and to pay a fine of one dollar ($1.00) and costs.

And you, the said keeper, in the name of the President of the United States aforesaid, are hereby commanded to receive the said David Pike into your custody in either of our Gaols, and him there safely to keep for the period of ten (10) days from and after this date, or be otherwise discharged in due course of law.

Hereof fail not at your peril.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 21st day of May, in the year of our Lord one thousand, nine hundred and *and* three.

(Signed) H. J. CARTER,
[SEAL.] *Clerk of the United States Circuit Court,*
Eastern District of Louisiana.

Marshal's Return on Commitment.

Filed May 30, 1903.

Received by U. S. Marshal, New Orleans, La., May 21, 1903, and on the same day I conveyed the body of the within David Pike in the Parish Prison to the custody of the jailer thereof.

(Signed) CHAS. FONTELIEU,
U. S. Marshal,
(Signed) By JOHN E. BOEHLER, *Dy. M.*

Rule for Contempt Against M. Coriat.

Filed May 22, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

On motion of Denegre, Blair and Denegre, solicitors for the Louisville and Nashville Railroad Company, complainant herein, and on suggesting to the Court that on the 16th day of May, 1903, a preliminary injunction was issued in this cause, prohibiting the defendants herein, and each of them, their servants, agents,
62 employees, assigns, successor and successors, and all others acting for them, or any or either of them, and all persons whomsoever, though not named therein, from and after the time when they severally have knowledge of the issuance of said injunction, from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupon or unused portion thereof, issued by complainant, the Louisville and Nashville Railroad Company, or by any other railroad company, for use over complainant's lines of railway, or any part thereof, for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903, which, by the terms and conditions thereof, are non-transferable; or from soliciting, advising, encouraging or procuring any person other than the original purchasers of said tickets to use or attempt to use said tickets for passage on any train or trains of complainant.

And on further suggesting to the Court that M. Coriat, whose proper first name is unknown to complainant, but who resides in the City of New Orleans and within this District, is in contempt of said injunctive order, and has violated its terms and conditions in this, to-wit: That on the afternoon of Thursday, May 21, 1903, the said M. Coriat did sell to one W. Wilson the unused portion of one of said non-transferable tickets issued by complainant for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903, namely, a ticket which had been sold to one M. Reavis and signed by him; that the said M. Coriat, his servants, agents and employees at No. 117 Royal Street, are dealing in said non-transferable Confederate Veterans' Reunion tickets, and buying and selling the same, in open and flagrant disregard of the said injunction, and in disobedience of its terms, and in contempt of the orders of this Court, although the said M. Cordiat, his servants, agents and employees, are and were well aware of the issuance of said injunction and of its terms and purport.

It is ordered that the said M. Coriat do show cause, on the 22nd

day of May, at 2 p. m. o'clock, why he should not be attached, taken into custody and punished for contempt, disregard and disobedience to the orders and authority of this Court.

(Signed) ALECK BOARMAN, *Judge.*

Marshal's Return on Rule.

Filed May 2nd, 1903.

63 Received by U. S. Marshal, New Orleans, La., May 22,/03, and on same day I served a copy hereof on the within named M. Coriat by handing same to him in person.

CHAS. FONTELIEU,
U. S. Marshal,
By T. I. GALBRITH, *Dy.*

Order Continuing Indefinitely Rule for Contempt Against M. Coriat.

(Extract from Minutes.)

NEW ORLEANS, FRIDAY, *May* 22, 1903.

Court met, pursuant to adjournment.
Present: Hon. Aleck Boarman, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
M. K. BITTERMAN ET AL.

On Motion of counsel for complainant, it is ordered that the rule for contempt taken in this cause against M. Coriat be continued indefinitely.

Rule for Contempt on Julius Mehlig.

Filed May 23, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

On motion of Denegre, Blair and Denegre, solicitors for the Louisville & Nashville Railroad [Company], complainant, complainant herein, and on suggesting to the Court that on the 16th day of May, 1903, a preliminary injunction was issued in this cause, pro-

hibiting the defendants, including Julius Mehlig, hereinafter referred to, and the other defendants herein, and each of them, their servants, agents, employees, assigns, successor and successors, and all others acting for them or any or either of them, and
64 all persons whomsoever, though not named therein, from and after the time when they severally have knowledge of the issuance of said injunction, from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued by complainant, the Louisville & Nashville Railroad Company, or by any other railroad company, for use over complainant's lines of railway or any part thereof, for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903, which; by the terms and conditions thereof, are non-transferable; or from soliciting, advising, encouraging or procuring any person other than the original purchasers of said tickets to use or attempt to use said tickets for passage on any train or trains of complainant.

And on further suggesting to the Court that one Julius Mehlig, one of the defendants in this cause, who resides in the City of New Orleans and within this District, is in contempt of said injunctive order and had violated its terms and conditions in this, to-wit: That on the morning of Saturday, May 23, 1903, the said Mehlig did sell the unused portion of one of said non-transferable tickets issued by the Macon & Birmingham R. R. for use over complainant's railroad, for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903, namely, a ticket which had been sold to S. H. Fuller and signed by him, which said ticket is annexed hereto and made part hereof; that the said Mehlig, his servants, agents and employees at his office on St. Charles Street, No. 113, are dealing in said non-transferable Confederate Veterans' Reunion tickets; are buying and selling the same, in open and flagrant disregard of said injunction and disobedience of its terms and in contempt of the orders of this Court, although the said Mehlig, his servants, agents and employees, are and were well aware of the issuance of said injunction and of its terms and purport.

It is ordered that the said Julius Mehlig do show cause, on the twenty-third day of May, at 2 p. m. o'clock, why he should not be attached, taken into custody and punished for contempt, disregard and disobedience to the orders and authority of this Court.

(Signed) ALECK BOARMAN, *Judge.*

Marshal's Return on Rule.

Received by U. S. Marshal, New Orleans, La., May 23/03,
65 & on same day I served copy hereof on Julius Mehlig by handing same to him in person in New Orleans, La.

CHAS. FONTELIEU,
U. S. Marshal,
By T. I. GALBRITH, *Dy.*

Reduced Rate Ticket.

Issued by Macon & Birmingham Railway Co., account U. C. V., 1903; signed "S. H. Fuller" (Original Purchaser), and filed with Rule for Contempt on Julius Mehlig, May 23, 1903.

NOTE.—To be transmitted in the original with this transcript, as per stipulation at page 209 hereof.

Rule for Contempt Against H. J. Wallace.

Filed May 23, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

On motion of Denegre, Blair and Denegre, solicitors for the Louisville and Nashville Railroad Company, complainant herein, and on suggesting to the Court that on the 16th day of May, 1903, a preliminary injunction was issued in this cause prohibiting the defendants and each of them, their servants, agents, employees, assigns, successor and successors, and all others acting for them or any or either of them, and all persons whomsoever, though not named therein, from and after the time when they severally have knowledge of the issuance of said injunction, from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued by complainant, the Louisville & Nashville Railroad Company, or by any other railroad company for use over complainant's lines of railway or any
66 part thereof, for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903, which by the terms and conditions thereof, are non-transferable; or from soliciting, advising, encouraging or procuring any person other than the original purchasers of said tickets to use or attempt to use said tickets for passage on any train or trains of complainant.

And on further suggesting to the Court that one A. J. Wallace, who resides in the City of New Orleans and within this District, is in contempt of said injunctive order, and had violated its terms and conditions in this, to-wit: That on the morning of Saturday, May 23, 1903, the said Wallace did sell the unused portion of one of said non-transferable tickets issued by the Seaboard Air Line for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903, and good over a portion of complainant's line of railroad, namely, a ticket which had been sold to J. H. Mil-

lette and signed by him, which said ticket is annexed hereto and made part hereof; that the said Wallace, his servants, agents and employees, at his office, No. 117 St. Charles Street, are dealing in said non-transferable Confederate Veterans' Reunion tickets, and buying and selling the same, in open and flagrant disregard of said injunction and disobedience of its terms, and in contempt of the orders of this Court, although the said Wallace, his servants, agents and employees, are and were well aware of the issuance of said injunction and of its terms and purport.

It is ordered that the said H. J. Wallace do show cause, on the 23rd day of May, at 2 p. m. o'clock, why he should not be attached, taken into custody and punished for contempt, disregard and disobedience to the orders and authority of this Court.

(Signed) ALECK BOARMAN, *Judge.*

Marshal's Return on Rule.

Filed May 29, 1903.

After diligent search and inquiry, I have been unable to find the within named H. J. Wallace in my District.

CHAS. FONTELIEU,
U. S. Marshal,
By T. I. GALBRITH, *D'y.*

67 *Reduced Rate Ticket.*

Issued by Seaboard Air Line Railway, account U. C. V. Reunion, 1903; signed "J. H. Mellette" (Original Purchaser); filed with Rule of Complainant against H. J. Wallace for Contempt, May 23, 1903.

NOTE.—To be transmitted in the original with this transcript of appeal, per stipulation at page 209 hereof.

Rule for Contempt Against G. F. Young.

Filed May 23, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

On motion of Denegre, Blair and Denegre, solicitors for the Louisville and Nashville Railroad Company, complainant herein, and on

suggesting to the Court that on the 16th day of May, 1903, a preliminary injunction was issued in this case, prohibiting the defendants, including G. F. Young, hereinafter referred to, and the other defendants herein, and each of them, their servants, agents, employees, assigns, successor and successors, and all others acting for them, or any or either of them, and all persons whomsoever, though not named therein, from and after the time when they severally have knowledge of the issuance of said injunction, from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued by complainant, the Louisville and Nashville Railroad Company, or by any other railroad company for use over complainant's lines of railway, or any part thereof, for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903, which, by the terms and conditions thereof, are non-transferable; or from soliciting, advising, encouraging or procuring any person other than the original purchasers of said tickets to use or attempt to use said tickets for passage on any train or trains of complainant.

68 And on further suggesting to the Court that one G. F. Young, one of the defendants in this cause, who resides in the City of New Orleans and within this District, is in contempt of said injunctive order, and has violated its terms and conditions in this, to-wit: That on the afternoon of Friday, May 22, 1903, the said Young did sell the unused portion of one of said non-transferable tickets issued by complainant for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903, namely, a ticket which had been sold to R. C. McMann and signed by him, which said ticket is annexed hereto and made part hereof; that the said Young, his servants, agents and employees, at his office on Canal Street, near Wells, are dealing in said non-transferable Confederate Veterans' Reunion tickets, and buying and selling the same, in open and flagrant disregard of said injunction and disobedience of its terms, and in contempt of the orders of this Court, although the said Young, his servants, agents and employees, are and were well aware of the issuance of said injunction and of its terms and purport.

It is ordered that the said G. F. Young do show cause, on the 23rd day of May, at 2 p. m. o'clock, why he should not be attached, taken into custody and punished for contempt, disregard and disobedience to the orders and authority of this Court.

(Signed) ALECK BOARMAN, *Judge.*

Marshal's Return on Rule.

Filed May 29, 1903.

After diligent search and inquiry, I have been unable to find the deft. named herein in my District.

CHAS. FONTELIEU,
U. S. Marshal,

(Signed) By T. I. GALBRETH, *D'y.*

Reduced Rate Ticket.

Issued by the Louisville & Nashville R. R. Company, account U. C. V. Reunion, 1903; signed "R. C. McMann" (Original Purchaser), and filed with Rule of Complainant against G. F. Young for Contempt, May 23, 1903.

69

NOTE.—To be transmitted in the original with this transcript of appeal, as per stipulation at page 209 hereof.

Card of Mehlig's Cut-Rate Ticket Office, offered by complainant on rule against Mehlig and filed May 23, 1903.

NOTE.—To be transmitted in the original with this transcript of appeal as per stipulation at page 209 hereof.

Hearing and Order Discharging Rule for Contempt Against J. Mehlig.

(Extract from Minutes.)

NEW ORLEANS, SATURDAY, *May* 23, 1903.

Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

The rule for contempt filed this day in this cause against Julius Mehlig came on this day for hearing.

Present: Denegre, Blair & Denegre appearing for complainant in rule.

H. L. Lazarus and Girault Farrar for Julius Mehlig, defendant in rule, and said Julius Mehlig in person.

Whereupon counsel for defendant in rule made a return *ore tenus,* and the trial was proceeded with.

After hearing the evidence and testimony and upon due consideration thereof, the Court adjudged that the defendant was not guilty and accordingly said defendant, Julius Mehlig, was discharged in this behalf.

70 *Rule for Contempt on Frank Roth.*

Filed May 23, 1903.

In U. S. Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET AL.

On motion of Messrs. Denegre, Blair & Denegre, solicitors for the Louisville & Nashville R. R. Co., complainant herein, and on suggesting to the Court that it having appeared at the trial of the rule for contempt herein against Julius Mehlig, on this 23rd day of May, 1903, that Frank Roth was on his own confession guilty of contempt of the Court, and violated the injunctive orders of the Court issued herein on the 16th day of May, 1903, by selling one of the non-transferable United Confederate Veterans' Re-Union tickets being the ticket annexed to said rule for contempt included within the terms and purport of said injunction; of which he had full knowledge; it is ordered that said Frank Roth show cause instanter before this court why he should not be attached, taken into custody and punished for contempt, disregard and disobedience of the orders of this Court.

——— ———,
Attorneys for Complainant.

Rule for Contempt on J. Rosenheim.

Filed May 23, 1903.

In U. S. Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET AL.

On motion of Messrs. Denegre, Blair & Denegre, solicitors for the Louisville & Nashville R. R. Co., complainant herein, and on suggesting to the Court that it having appeared at the trial of the rule for contempt herein against Julius Mehlig, on this 23rd day of
71 May, 1903, that J. Rosenheim was on his own confession guilty of contempt of the Court, and violated the injunctive orders of the Court, issued herein on the 16th day of May, 1903, by selling one of the non-transferable United Confederate Veterans' Re-Union tickets being the ticket annexed to said rule for contempt included

within the terms and purport of said injunction; of which he had full knowledge; it is ordered that said J. Rosenheim show cause instanter before this Court why he should not be attached, taken into custody and punished for contempt, disregard and disobedience of the orders of this Court.

——— ———,
Attorneys for Complainant.

Hearing and Judgment of Guilty Against Fred. Roth.

(Extract from Minutes.)

NEW ORLEANS, SATURDAY, *May* 23, 1903.

Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE R. R. CO.
vs.
MARCUS K. BITTERMAN ET ALS.

The rule for contempt taken this day against Fred Roth was called for hearing.

J. P. Blair, counsel for complainant, present;

H. L. Lazarus & Girault Farrar, counsel for defendant in rule, and said defendant in rule, Fred Roth, present.

Whereupon, after reading of the rule for contempt against the defendant, Fred Roth, counsel for said defendant, Roth, submits the issue on the facts proved in the testimony heard on the rule for contempt against Julius Mehlig, said defendant reserving the right to discuss the issue as a question of law; whereupon the trial was entered into, counsel for the respective parties announcing themselves to be ready.

After hearing arguments from the counsel for defendants in rule and in consideration of all the facts in the case, the
72 Court finds and adjudges the defendant Roth guilty of wilful and unlawful contempt of this Court.

It is therefore considered and adjudged that the said defendant Frank Roth be confined in the Parish Prison of the Parish of Orleans, State of Louisiana, for the period of ten (10) days, from this date and that he pay a fine of one hundred dollars and costs and stand committed until said fine and costs are paid.

It is further ordered that the marshal of the United States for this district do carry this sentence into effect forthwith.

Commitment of Frank Roth.

Filed May 30/03.

UNITED STATES OF AMERICA, *Eastern District of Louisiana, ss:*

To the Marshal of the Eastern District of Louisiana or either of his deputies, and the keeper of either of the Goals in said District, Greeting:

These are, in the name of the President of the United States of America, to command you, the said marshal or deputies, and each of you, forthwith to convey and deliver into the custody of the keeper of the Parish Prison of the Parish of Orleans, State of Louisiana, the body of Frank Roth, adjudged guilty of wilful and unlawful contempt of the authority of this Court by unlawfully violating the injunction issued May 16, 1903, in the cause entitled the Louisville & Nashville R. R. Co. *vs.* Marcus K. Bitterman *et als.*, No. 13,166 of the docket of this Court, and sentenced to be confined in the said Parish Prison for the period of ten days from this date and to pay a fine of one hundred dollars ($100) and stand committed until said fine is paid.

And you, the said keeper, in the name of the President of the United States, aforesaid, are hereby commanded to receive the said Frank Roth into your custody and him there safely to keep for the period on [of] ten days (10) from this date and until the said fine is paid, or he be otherwise discharged in due course of law.

Hereof fail not at your peril.

Witness the Honorable Melville W. Fuller, Chief Justice
73 of the Supreme Court of the United States this 23 day of May, in the year of our Lord one thousand nine hundred and three.

(Signed) H. J. CARTER,
[SEAL.] *Clerk of the United States Circuit Court, Eastern District of Louisiana.*

Marshal's Return.

Filed May 30, 1903.

Received by U. S. Marshal, New Orleans, La., May 23/03, and on the same day I conveyed the within named Frank Roth to the Parish Prison and delivered him to the jailor of the said Parish Prison.

CHAS. FONTELIEU,
U. S. Marshal,
By JOHN E. BOEHLER, *Dy. M.*

Hearing and Judgment of Guilty of Contempt as to J. Rosenheim.

(Extract from Minutes.)

NEW ORLEANS, SATURDAY, *May* 23, 1903.

Court met pursuant to adjournment:
Present: Hon. Aleck Boarman, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

The rule for contempt taken this day against J. Rosenheim was called for hearing.

J. P. Blair, of counsel for complainant, present;

H. L. Lazarus and Girault Farrar, counsel for the defendant in rule, J. Rosenheim, and said defendant in rule J. Rosenheim, present.

Whereupon after reading of the rule for contempt against the defendant J. Rosenheim, counsel for said defendant Rosenheim submits the issue on the facts proved in the testimony heard on the rule for contempt against Julius Mehlig, said defendant reserving the right to discuss the issue as a question law.

74 Whereupon the trial was entered into, counsel for the respective parties announcing themselves ready.

After hearing arguments from the counsel for defendant in rule and in consideration of all the facts in the case, the Court finds and adjudges the defendant Rosenheim, guilty of wilful and unlawful contempt of this Court.

It is therefore considered and adjudged that the said defendant, J. Rosenheim, be confined in the Parish Prison of the Parish of Orleans, State of Louisiana, for the period of ten days, from this date and that he pay a fine of one hundred dollars and costs and stand committed until said fine and costs are paid.

It is further ordered that the marshal of the United States for this District do carry this sentence into effect forthwith.

Commitment of J. Rosenheim.

Filed 23rd Day of May, 1903.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET ALS.

UNITED STATES OF AMERICA, *Eastern District of Louisiana, ss:*

To the Marshal of the Eastern District of Louisiana, or either of his deputies, and the keeper of either of the Gaols in said District:

These are, in the name of the President of the United States of America, to command you, the said marshal or deputies, and each of you, forthwith to convey and deliver into the custody of the keeper of the Parish Prison of the Parish of Orleans, State of Louisiana, the body of J. Rosenheim, adjudged guilty of wilful and unlawful contempt of the authority of this Court by unlawfully violating the injunction issued May 16th, 1903, in the cause entitled the Louisville and Nashville Railroad Company *vs.* Marcus K. Bitterman, *et als.*, No. 13,166 of the docket of this Court and sentenced to be confined in the said Parish Prison for the period of ten days from this date and to pay a fine of one hundred dollars ($100) and stand committed until said fine is paid.

75 And you, the said keeper, in the name of the President of the United States, aforesaid, are hereby commanded to receive the said J. Rosenheim into your custody, and him there safely to keep for the period of ten (10) days from this date and until the said fine is paid or he be otherwise discharged in due course of law.

Hereof fail not at your peril.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23 day of May, in the year of our Lord one thousand nine hundred and three.

(Signed) H. J. CARTER,
[SEAL.] *Clerk of the United States Circuit Court,*
Eastern District of Louisiana.

Marshal's Return.

Filed May 30, 1903.

Received by U. S. Marshal, New Orleans, La., May 23/03, and on the same day I conveyed the body of the within named J. Rosenheim to the Parish Prison and delivered him to the jailer thereof.

CHAS. FONTELIEU,
U. S. Marshal,
By JOHN E. BOEHLER, *Dy. M.*

Motion of Complainant and Order Continuing Rule for Contempt Against H. J. Wallace and G. F. Young Indefinitely.

(Extract from Minutes.)

NEW ORLEANS, SATURDAY, *May* 23, 1903.

Court met pursuant to adjournment:
Present: Hon. Aleck Boarman, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
MARCUS K. BITTERMAN ET ALS.

On motion of Denegre, Blair & Denegre, of counsel for complainant, it is ordered the rules for contempt taken in this case against H. J. Wallace and G. F. Young be continued indefinitely.

76 *Replication of the Louisville and Nashville Railroad Company.*

Filed December 11, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET ALS.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of defendants, Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, for replication thereto saith:

That it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in law to be replied unto by this repliant: without that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto or avoided, traversed or denied is true; all which matters and things this repliant is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby only prays as in and by its said bill it hath already prayed.

(Signed) DENEGRE, BLAIR & DENEGRE,
Solrs. for Complainant.

Order to Appoint Examiner.

Filed January 9, 1904.

United States Circuit Court, Eastern District of Louisiana.

No. 13166. In Equity.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET AL.

On motion of Denegre, Blair & Denegre, of counsel for complainant, and on suggesting to the Court that this cause
77 is now at issue and that under the rules in equity it is proper to appoint an examiner to take testimony and evidence herein:

It is ordered that Henry J. Carter, Esq., be appointed examiner to take testimony and evidence in this cause and return the same to the Honorable Court.

January 9th, 1904.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Motion for Injunction, &c.

Filed January 25th, 1904.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

On motion of Denegre, Blair & Denegre, solicitors for complainant herein, it is ordered that the defendants, Marcus K. Bitterman, Julius Mehlig, Charles T. Kelsko, David Pike, George M. Johnson, G. F. Young and J. G. Finney, do show cause before this Court at 11 o'clock A. M., on the 23rd day of January, 1904, why an injunction *pendente lite* should not issue herein directed to each of the above named defendants and to their or his agents, servants, employés, assigns, successor and successors, and all others acting for defendants, or any or either of them, and all other persons whomsoever, to restrain them, and each of them, his or their agents, servants, employés, assigns, successors or successor, and all others acting for them, or any or either of them, and all persons whomsoever, though not named herein, from and after the date when they severally have knowledge of the entry or existence of said injunction, from buying,

selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued by complainant, or by any other railroad for use over complainant's lines of railway, or any part of them, which, by the terms thereof, are non-transferable, or from soliciting, advising, encouraging or procuring any person other than the original purchaser of such tickets to use or attempt to use said tickets for passage on any
78 train or trains of complainant, especially including the non-transferable round-trip tickets issued for use on the occasion of the Mardi Gras festivals in New Orleans.

New Orleans, La., January 20, 1904.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Marshal's Return.

Filed Jan'y 25, 1904.

Received by U. S. Marshal, New Orleans, La., Jan'y 20, 1904, and on Jan'y 21st, 1904, I served copy hereof on Marcus K. Bitterman by handing the same to him in person; and on Julius Mehlig by handing the same to him in person; and on Chas. T. Kelsko by handing the same to H. L. Lazarus and Girault Farrar, attorneys of record in person. David Pike, Geo. M. Johnson, G. F. Young and J. G. Finney were not found in New Orleans, La.

(Signed) CHAS. FONTELIEU,
U. S. Marshal.

" By J. H. PATIN,
D'y U. S. Marshal.

Demurrer.

Filed January 23rd, 1904.

U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division.

No. —. In Equity.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET AL.

To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana:

The joint and several demurrer of Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, defendants, to the bill of complaint of the

These defendants, by protestation, not confessing all or any of the matters and things in the said complainant's bill of complaint con-

tained to be true, in such manner and form as the same are
79 therein set forth and alleged, do demur to the said bill and for cause of demurrer show:

That the said bill doth not contain any matter of equity, whereon this Court can ground any decree, or give to the complainant any relief, against these respondents, or any of them.

That the case sought to be made by the complainant's bill, is a moot case, and not a real controversy, and does not entitle the complainant to any discovery or relief as against these defendants or any or all of them.

Wherefore, and for divers other good causes and grounds of demurrer appearing in the said bill, these defendants, jointly and severally do demur thereto and humbly demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill; and pray to be hence dismissed with their costs and charges most wrongfully sustained.

(Signed) H. L. LAZARUS,
" GIRAULT FARRAR,
" JAMES O'CONNOR,
Solicitors for Resp's.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans, ss:

Before me, the undersigned authority, a notary public of the Parish of Orleans, State of Louisiana, duly commissioned and qualified, personally came and appeared, Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, each of whom being duly sworn, deposes and says, that they the said Bitterman, Mehlig and Kelsko, are the defendants named in the foregoing joint and several demurrer, and that the said demurrer is not interposed for delay.

(Signed) M. K. BITTERMAN.
JULIUS MEHLIG.

Sworn to and subscribed on this 22nd day of January, 1904.

(Signed) H. MICHEL, *Not. Pub.*

Certificate of Counsel.

We certify that, in our opinion, the above and foregoing joint and several demurrer, is well founded in point of law.

(Signed) H. L. LAZARUS,
" GIRAULT FARRAR,
" JAMES O'CONNOR,
Solicitors for Respondents.

80 *Motion of Defendant and Order Continuing Rule for Injunction to February 2, 1904, by Preference.*

Extract from the Minutes.

SATURDAY, *January* 23, 1904.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
M. K. BITTERMAN ET AL.

No. 13167.

TEXAS & N. O. R. R. Co.
vs.
M. K. BITTERMAN ET AL.

On motion of H. L. Lazarus, of counsel for Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, defendants, it is ordered that the rules for injunctions herein fixed for to-day be continued, there being an open case on trial before the jury, to-day.

And it is further ordered that said rules be continued to February 2, 1904, at 11 A. M. to be taken up by preference, counsel for complainants being present, as also H. L. Lazarus, of counsel for said above named defendants.

Motion and Order Continuing Rule—and Demurrer.

Extract from the Minutes of February 2, 1904.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET AL.

No. 13167.

TEXAS & NEW ORLEANS R. R. Co.
vs.
SAME.

On motion of H. L. Lazarus, of counsel for defendants, suggesting that he is not ready to try the matters fixed for to-day in above causes:—

81 It is ordered that the said causes be continued until to-morrow at 11 A. M. to be heard on the applications to enlarge the injunctions and on the demurrers.

Hearing and Submission of Rule for Injunction.

Extract from the Minutes, November Term, 1903.

NEW ORLEANS, WEDNESDAY, *February* 3, 1904.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE R. R. CO.
vs.
MARCUS K. BITTERMAN ET AL.

This cause came on this day to be heard upon the motion of the complainant filed January 20, 1904, for an injunction *pendente lite* herein.

Denegre, Blair & Denegre, appearing for complainants in rule;
H. L. Lazarus, Girault Farrar and J. O'Connor, for Marcus K. Bitterman, Jul. Mehlig and C. T. Kelsko, defendants.

Whereupon counsel for complainant offered his evidence in support of the motion for an injunction, counsel for defendants being allowed until Friday next at 3 P. M. to file their evidence. And thereupon the Court heard arguments from the solicitors for the respective parties and took the matter under consideration.

82 *Note of Evidence for Complainant on Application for Injunction Pendente Lite.*

Filed Feb'y 3, 1904.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

In the Matter of the Application for an Injunction Pendente Lite.

Solicitor for complainant offers, reads and files in evidence as affidavits upon this hearing, the bill of complaint; the exhibits thereto; the depositions of J. K. Ridgely and George F. Cranmer, taken in this cause January 21, 1904, and the exhibits referred to therein; and the affidavits of J. K. Ridgely of February 1, 1904, together with the exhibit thereto attached.

(Signed) DENEGRE, BLAIR & DENEGRE,
Sol'rs for Complainant.

Depositions of J. K. Ridgely and George F. Cranmer.

Taken in the cause January 21, 1904, and the Exhibits referred to therein; offered by Complainant on hearing of Application for Injunction, February 3, 1904, as per Note of Evidence.

NOTE.—Depositions of J. K. Ridgely and George F. Cranmer copied at pages 134 and 173 respectively of this transcript.

83 *Evidence Offered on Application for Injunction, February 3, 1904.*

United States Circuit Court, Eastern District of Louisiana.

No. —.

LOUISVILLE & NASHVILLE R. R. CO.
vs.
M. K. BITTERMAN.

Affidavit of J. K. Ridgely.

Filed Feb'y 3, 1904.

J. K. Ridgely, being duly sworn, deposes and says that he attaches hereto form of ticket which has been adopted and will be used on the occasion of the Mardi Gras festival to be held in New Orleans this month; that said ticket has [had] not yet reached him when he gave his deposition in this case on the twenty-first of January, 1904; and that said ticket has been signed by him "Ridgely A" for identification herewith.

(Signed) J. K. RIDGELY.

N. O., Feb. 1, 1904.

[SEAL.] (Signed) PERCY S. BENEDICT, *Not. Pub.*

Sample of Reduced Rate Ticket.

Issued by Louisville & Nashville Railroad Company, account Mardi Gras, 1904; attached to Affidavit of J. K. Ridgely, marked "Ridgely A," and filed February 3, 1904.

NOTE.—To be transmitted in the original with this Transcript of Appeal, as per stipulation at page 201 hereof.

84 *Affidavit of Charles L. Stone.*

Filed *Nunc Pro Tunc* as of Date Feb'y 5, 1904.

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

Charles L. Stone, being duly sworn, deposes and says: That he resides in the City of Louisville, in the State of Kentucky; that he is General Passenger Agent of the Louisville & Nashville Railroad Company, complainant herein; that the said complainant is not a member of any passenger traffic association or combination of railroads which has any power or authority to fix, maintain or control rates, or make rules or regulations affecting rates, or make ticket contracts; nor has it any agreement or contract with any other railroad companies which interferes with or controls its entire freedom and power to fix or maintain rates.

That the making of special rates on the occasion of the annual Mardi Gras festivals at New Orleans, and on the occasion of conventions and the like, including the United Confederate Veterans' Reunion, which is to meet in the City of New Orleans, on May 19, 1903, is entirely determined by complainant's officers and agents, without the interference or control or interposition of any other railroad company or association of railroad companies, or any other person, except that the terms and conditions of through tickets, good for passage over direct connecting lines, are agreed to by the lines over which they are good for travel.

That several years ago, the executive officers of the Louisville and Nashville Railroad Company authorized the Passenger Department to make a special rate of one cent per mile on the occasion of the United Confederate Veterans' Reunion, and that when the request was made on behalf of the Reunion to be held in New Orleans as aforesaid for a special rate, the reduced rate and the non-transferable round-trip tickets referred to in the bill of com-

85 plaint herein, with the contents of which affiant is familiar, were agreed to be made by the Passenger Department of complainant, under the aforesaid authority; that complainant had no pooling agreement in respect to said business, or any other business, with any other railroad company. One word interlined and added approved before signature.

(Signed) C. L. STONE.

Sworn to and subscribed before me, notary, on this thirteenth day of May, A. D. 1903.

(Signed) FELIX J. PUIG,
[SEAL.] *Notary Public, Parish of Orleans, State of Louisiana.*

Affidavit of Charles L. Stone.

Filed *Nunc Pro Tunc* as of Date Feb'y 5, 1904.

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

Charles L. Stone, being duly sworn, deposes and says: That he is a resident of the City of Louisville, State of Kentucky; that he is General Passenger Agent of the Louisville and Nashville Railroad Company, complainant herein, and has been for the past two years and a half; that he is familiar with the organization and working and business of the Passenger Department of the said railroad company in the City of New Orleans, which is under his general jurisdiction; that neither the said Passenger Department nor any of its officers, agents or employees, has any authority to buy or sell tickets from or to any ticket broker or scalper, or to have any dealing or transaction of any kind with said ticket brokers or scalpers; and that, to the best of affiant's knowledge, information and belief, no such dealings, buying or selling of tickets has taken place between complainant, its officers, agents or employees,
86 and any ticket broker or scalper in New Orleans, including the defendants, except that if any ticket broker, or his agent or representative, applies for the purchase of any ticket or tickets at the office of complainant and offers to pay the full tariff rate and to comply with the ordinary conditions required of any of the public, then affiant, as bound in law to do, will sell said ticket to said ticket broker, or his agent or representative, in the same way as it would sell similar tickets to any of the public. Eleven words added and interlined; done and approved before signing.

(Signed) C. L. STONE.

Sworn to and subscribed before me, notary, on this thirte-nth day of May, 1903.

(Signed) FELIX J. PUIG,
[SEAL.] *Notary Public, Parish of Orleans, State of Louisiana.*

Reasons of the Court on Application for Preliminary Injunction.

Filed February 13, 1904, *Nunc Pro Tunc* as of Feb'y 8, 1904.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET AL.

Reasons of the Court on the Application of the Louisville & Nashville R. R. Co. for Preliminary Injunction.

PARLANGE, *District Judge:*

The fundamental question in this matter is not whether a statute forbidding any person from engaging in the business of buying and selling any railroad tickets whatever would be upheld by this Court; but the question is whether the defendants can and should be enjoined from buying and selling railroad tickets issued at reduced rates to persons who contract and bind themselves not to transfer them, the non-transferability being clearly apparent on the face of the tickets.

At times during the course of the argument on behalf of the defendants, it seemed to be assumed by their counsel that the matter in hand was whether the defendants could be en-
87 joined from buying and selling any railroad tickets, transferable as well as non-transferable tickets. No such question is herein involved.

Great reliance was placed by defendants' counsel on a decision of the Court of Appeals of New York, holding that a statute evidently intended to destroy and prohibit practically the business of railroad ticket brokers, regardless of the nature of the tickets dealt in, would not be sustained by the Courts. A similar decision by the Court of Appeals of Texas was also pressed upon the attention of the Court. It is perfectly clear that it was not held in these cases that a person who has by contract, for a valuable consideration, bound himself to a railroad company not to transfer a ticket will be allowed by the Courts to violate his contract, and that outsiders, whose purpose is personal gain, will be allowed by the Courts to assist the ticket holder in violating his contract.

The necessities of the defendants' case compel them to deny the validity of a contract between a railroad company and a ticket holder, whereby, in consideration of a reduced rate, the ticket is made non-transferable. But it is clear, beyond question, that the matter has been settled adversely to the defendants' contention. It is equally clear that all the other contentions raised on behalf of the defendants—such as multifariousness and the doctrine of

"clean hands" in equity, as applied to the facts in this case—have all been held by the Courts to be without force.

It was also contended on behalf of defendants that the Supreme Court of this State has held favorably to their views. This contention is based solely upon the fact that an application, similar to the present case, was made to the Civil District Court for the Parish of Orleans, praying for an injunction similar to the one herein prayed for. Upon the refusal of the injunction by the lower Court, an application was made to the Supreme Court of the State for a mandamus to compel the issuance of the injunction, which application was refused by the Supreme Court, without reasons assigned. The application to the Supreme Court was not made by appeal, nor under the power of the Supreme Court to supervise the lower Courts. It is, therefore, absolutely incorrect to asume that the Supreme Court believed that the railroad company had no case warranting an injunction simply because that Court refused to mandamus the lower Court to take action in a matter which was clearly left to the discretion of the lower Court. And there
88 are other grounds upon which the Supreme Court may have based its action, without holding that, as a matter of law, no injunction should issue in similar cases.

It was also argued on behalf of defendants, with great earnestness and insistence, that the public policy of this State and of the United States is opposed to the views of the law taken by complainant.

The only fact presented in support of the contention that the suit was in opposition to the public policy of the State of Louisiana is that a certain bill, relating to railroad ticket brokers, was defeated in the State Legislature of 1902. It is obvious that that bill must have been intended to destroy and prohibit absolutely the entire business of railroad ticket brokers, regardless of the nature of the tickets dealt in. But the minority of the committee which reported the bill clearly show by their minority report that they, although opposed to the bill, were convinced that a contract not to transfer a railroad ticket—under proper conditions, of course— is binding and valid and should be enforced.

It can also be shown that there is no announcement of the public policy of the United States which could be held to militate herein against the complainant or in favor of the defendants.

It should be specially noticed that in this case there is no denial, but, on the contrary, an admission that the defendants deal in the class of tickets in question, and the defendants contend that they have the right to deal with them.

The matter, therefore, turns mostly, if not entirely, on questions of law, upon all of which I find against the defendants.

In this case this Court, through Judge Boarman, issued an injunction concerning the United Confederate Veterans' Reunion tickets, after full argument. But the matter has been re-argued before me *de novo*, as though this Court had not already passed on the questions of law involved. Judge Boarman having virtually declined to issue an injunction including all non-transferable tickets to be

issued at any time in the future. I see no reason to re-examine that question and to pass upon it at the present time.

A preliminary injunction will issue as to the non-transferable Mardi Gras tickets.

The railroad company must give in this case a bond of five thousand dollars to hold the defendants harmless against any damages in the case.

89 *Note by the Court.*

See in support of the opinion:

Mosher *vs.* St. Louis, etc., R. W. Co., 127 U. S., 390.
Boylan *vs.* Hot Springs R. R. Co., 131 U. S., 146.
Angle *vs.* Chicago, etc., R. W. Co., 151 U. S., 1.
Nashville, etc., R. W. Co. *vs.* McConnell *et al.*, 82 F. R., 65.
Delaware, etc., R. R. Co. *vs.* Frank *et al.*, 110 F. R., 689.
Penn. R. R. Co. *et al. vs.* Beekman *et al.* In Supreme Court of the District of Columbia. Decided October 13th, 1903.
Kinner *et al. vs.* Lake Shore, etc., R. R. Ohio Law Bulletin, Vol. 47, No. 18, p. 294. In Circuit Court for the Eighth Circuit of Ohio. Decided February 10th, 1902.
Shubach *vs.* Judge; Hirt *vs.* Judge; Leonard *vs.* Judge, etc., etc. In Supreme Court of Missouri, October Term, 1903.
Wabash R. R. Co. *vs.* Wasserman *et al.* In Circuit Court of the City of St. Louis.
Wood's R. R. Law, Vol. 3, Sec. 347.
A. & E. Ency. Law (1st Edn.), Verbis "Tickets and Fares," Vol. 25, p. 1091.

Decree Ordering Injunction as to Tickets During Mardi Gras.

Filed February 8, 1904.

United States Circuit Court, Eastern District of Louisiana, Sitting at New Orleans.

No. 13166.

LOUISVILLE & NASHVILLE R. R. CO.
vs.
MARCUS K. BITTERMAN, JULIUS MEHLIG, CHARLES T. KELSKO ET AL.

In the Matter of the Rule herein Taken by Complainant on Defendants for an Injunction *Pendente Lite.*

This cause came on to be heard on the third day of February, 1904, and the Court, after hearing counsel for complainant and counsel for defendants, Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, took the same under advisement, and now, being fully advised in the premises, and having considered the

sworn allegations of the bill and of the answer, and of the
90 affidavits submitted on both sides, and considering that the other defendants not named have filed no appearance or responsive pleadings to the bill of complaint, and being of the opinion that complainant is entitled to an injunction *pendente lite*, as prayed for:

It is ordered, adjudged and decreed that a writ of injunction be issued out of and under the seal of this Court, addressed to Marcus K. Bitterman, Julius Mehlig, Charles T. Kelsko, David Pike, George H. Johnson, G. F. Young, Fred Young and J. G. Finney, and each of them, and to their or his agents, servants, employees, assigns, successors or successor, and all others acting for defendants or any or either of them, and all other persons whomsoever, restraining, enjoining and inhibiting them and each of them, his or their agents, servants, employees, assigns, successors or successor, and all others acting for them, or any or either of them, and all persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the issuance of the injunction herein, from buying, selling, dealing or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions; buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued by complainant, or by other railroads for use over complainant's lines of railway, or any part of them, for use on the occasion of the Mardi Gras festivals at New Orleans in February, 1904, which, by the terms thereof, are non-transferable and purporting to be signed by the original purchaser or from soliciting, advising, encouraging or procuring any person other than the original purchasers of such ticket or tickets to use or attempt to use said tickets for passage on any train or trains of complainant; this injunction to continue in force during the pendency of this suit, or until the further orders of this Court; complainant to give a bond with one good and sufficient surety in the penal sum of five thousand dollars to secure said defendants against all loss or damages which may result from the issuance of this injunction, if it should be finally determined that the same was improperly issued.

Dated at New Orleans, Louisiana, in the Eastern District of Louisiana, this eighth (8th) day of February, 1904.

(Signed) CHARLES PARLANGE,
U. S. Judge.

91

Bond.

Filed February 8, 1904.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

Know all men by these presents, that we, the Louisville and Nashville Railroad Company, as principal, and R. M. Walmsley, as surety, parties of the first part, are held and firmly bound unto said Marcus K. Bitterman, Charles T. Kelsko, Julius Mehlig, David Pike, C. F. Young, George H. Johnson and J. G. Finney, defendants in the above entitled action, and each of them, parties of the second part, in the just and full sum of five thousand dollars ($5000.00), for the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 8th day of February in the year of our Lord one thousand nine hundred and four.

Upon the conditions as follows:

Whereas the said Louisville and Nashville Railroad Company has commenced its certain suit against the above named parties defendants in the Circuit Court of the United States in and for the Eastern District of Louisiana, and therein prayed for an injunction against defendants pending the trial of said suit; and whereas the Honorable Charles Parlange, holding said Court, has granted said prayer for said preliminary injunction and has ordered that said complainant shall cause to be executed a good and sufficient bond to the defendants for the sum of five thousand dollars ($5,000.00) to secure them against all costs and damages which may be awarded to them in case said order shall be finally determined to have been improperly granted.

Now, therefore, if the said Louisville and Nashville Railroad Company shall well and truly pay to said defendants all costs and damages which may be awarded to them, or any of them, in case said Court shall finally determine that said order was improperly granted, not exceeding the said sum of five thousand dollars ($5,000.00), then this obligation to be null and void; otherwise to be and remain in full force and effect.

92 Witness our hands and seals this 8th day of February, A. D. 1904.

(Signed) LOUISVILLE & NASHVILLE R. R. CO.
By C. MARSHALL, *Superintendent.*
(Signed) R. M. WALMSLEY.

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

R. M. Walmsley, being first duly sworn according to law, deposes and says: I am the same person whose name is subscribed to the foregoing bond as the surety therein, and I state that I am worth the sum specified as the penalty thereof over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

(Signed) R. M. WALMSLEY.

Subscribed and sworn to before me this eighth day of February, 1904.

[SEAL.] (Signed) EDGAR BRIMA, *Not. Pub.*

Injunction Issued to Marcus K. Bitterman, Julius Mehlig, David Pike, Charles T. Kelsko, George H. Johnson, G. F. Young, Fred. Young, J. G. Finney.

10th Feby., 1904.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN, JULIUS MEHLIG, DAVID PIKE, CHARLES T. KELSKO, GEORGE H. JOHNSON, G. F. YOUNG and J. G. FINNEY.

The President of the United States of America, to Marcus K. Bitterman, Julius Mehlig, David Pike, Charles T. Kelsko, George H. Johnson, G. F. Young, Fred. Young, J. G. Finney and each of them and their, or his agents, servants, employees, assigns,
93 successor or successors, and all others acting for them, or any or either of them, and all persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the issuance of this injunction, Greeting:

Whereas, it has been represented unto us in our said Circuit Court on the part of the Louisville and Nashville Railroad Company in a Bill of Equity lately exhibited against you and each one of you touching certain matters and things therein set forth.

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said Marcus K. Bitterman, Julius Mehlig, David Pike, Charles T. Kelsko, George H. Johnson, G. F. Young, Fred Young and J. G. Finney, your attorneys and each of you, and your agents, servants, employees, assigns, successor and successors, and all others acting for you, or any or either of you, and all persons whomsoever, though not named herein, from and after the

time when they severally have knowledge of the issuance of this injunction are hereby commanded and strictly enjoined under the penalty of the law, that you absolutely refrain and desist from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupon or unused portion thereof, issued by complainant, the Louisville and Nashville Railroad Company, or by any other railroad company for use over complainant's lines of railway or any part of them, for use on the occasion of the Mardi Gras festivals at New Orleans, in Feby., 1904, which by the terms thereof, are non-transferable, and purporting to be signed by the original purchaser, or from soliciting, advising, encouraging or procuring any person other than the original purchasers of said tickets to use or attempt to use said tickets for passage on any train of complainant, and that you remain so inhibited and enjoined until the further order of our said Court in the premises.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New Orleans, this 10th day of Feby. in the year of our Lord 1904.

[SEAL] (Signed) H. J. CARTER, *Clerk.*

Marshal's Return.

Filed Feb. 22, 1904.

94 Received by U. S. Marshal, New Orleans, La., Feby. 10th, 1904, and on the same day, month and year I served copy hereof on the parties hereinafter named in the City of New Orleans, La., in the manner following, to-wit: Marcus K. Bitterman, by handing same to him in person, Julius Mehlig, by handing same to him in person, Chas. T. Kelsko by handing same to him in person, and on the 12th day of Feb. 1904, I served copy hereof on Robt. Shwarts and W. N. Gillentine by handing the same to each of them in person in N. O.

(Signed) CHAS. FONTELIEU, *U. S. Marshal.*
" By T. I. GALBRETH, *Dy.*

Motion to Strike Demurrer from the Files.

Filed February 13, 1904.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

Now comes complainant, through Denegre, Blair and Denegre, its solicitors, and on suggestion to the Court that on 14th day of May,

1903, defendants Julius Mehlig, Charles T. Kelsko and Marcus K. Bitterman filed an answer to the whole bill herein; that on the 11th day of December, 1903, complainant filed its replication to said answer; and that on the 9th day of January Harry J. Carter was appointed commissioner before whom testimony in the cause should be taken; and that on the 21st day of Jany., 1904, complainant took the depositions to witnesses, namely J. K. Ridgely and George Kramer; and that on the 23rd day of January 1904, the said above named defendants filed a general demurrer to the whole bill:

It is ordered that the above named defendants, Julius Mehlig, Charles T. Kelsko and Marcus K. Bitterman do show cause on Saturday, February 20, 1904, at 11 a. m., why said demurrer should not be stricken from the files as irregularly filed after an answer to the whole bill and without leave of Court previously obtained; and in the alternative, that they show cause why said demurrer should
95 not be overruled as without merit and not well founded in law.

Marshal's Return.

Filed Feb. 17, 1904.

Received by U. S. Marshal, New Orleans, La., Feby. 15/04 & on Feb'y 16/04 I served a true copy of the within motion on H. L. Lazarus, Girault Farrar & J. C. O'Connor attys. of record, by handing the same to H. L. Lazarus in person in the City of New Orleans, La.

CHARLES FONTELIEU,
U. S. Marshal.

(Signed) By JOHN E. BOEHLER, *D'y M.*

Order Overruling Demurrer.

Extract from the Minutes, November Term, 1903.

NEW ORLEANS, SATURDAY, *February* 20, 1904

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

This cause came on to be heard this day upon the motion filed by complainant on February 13, 1904, to strike out the demurrer of defendant filed January 23rd, 1904, or in the alternative to have defendant show cause why said demurrer should not be overruled

Denegre, Blair & Denegre appearing for the mover.

Henry L. Lazarus for defendants, Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko.

And was argued by counsel.

Whereupon the Court without passing upon the motion to strike the demurrer from the files as having been irregularly filed, ordered that said demurrer be overruled.

96 *Motion & Order for Leave to File Plea to Jurisdiction.*

Filed March 8, 1904.

United States Circuit Court, Eastern District of Louisiana.

No. —. In Equity.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
MARCUS K. BITTERMAN ET AL.

To the Honorable Judges of the United States Circuit Court for the Eastern District of Louisiana:

Now come Marcus K. Bitterman, Charles T. Kelsko and Julius Mehlig, through their undersigned counsel, and here advising the Court that the bill of complaint herein exhibited against them, and in which bill temporary relief was sought by injunction process and in order to meet the equities of said bill these respondents made answer under oath, and that at the preliminary hearing the temporary relief there sought was accorded complainant; and on further suggesting to the Court that they are now advised that this Honorable Court is without jurisdiction *ratione materia* to hear and determine this cause; and that appearers desiring at this time to formally present for the Court's consideration and decision their plea to the jurisdiction of the Court, and that until said plea to the jurisdiction shall have been disposed of by the Court's ruling they ought to be relieved from the further defense to the cause upon its merits;

It is ordered that plaintiff show cause on Saturday, March 12/04 why defendants should not have leave to file their plea to the jurisdiction of the Court and to its right to entertain said cause or to accord the relief therein sought; that no further proceeding affecting the merits of this controversy shall be had or taken until after the hearing by this Court of defendants' plea to its jurisdiction.

(Signed) HENRY L. LAZARUS,
" GIRAULT FARRAR,
Solicitors.

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97 *Order Continuing Motion of Defendant to File Plea.*

Extract from the Minutes of Saturday, March 12, 1904.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
M. K. BITTERMAN ET AL.

Owing to absence of counsel for plaintiffs in rule, M. K. Bitterman *et al.*, it is ordered that the rule fixed for to-day herein, be continued to March 19, 1904, at 11 A. M.

Hearing and Submission of Motion of Defendants to File Plea.

Extract from the Minutes, November Term, 1903.

NEW ORLEANS, SATURDAY, *March* 19, 1904.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
M. K. BITTERMAN ET AL.

The motion of Marcus K. Bitterman, Julius Mehlig and C. T. Kelsko, defendants to file a plea to the jurisdiction herein, came on to be heard this day.

H. L. Lazarus appearing for Movers.

Denegre, Blair & Denegre for Louisville & Nashville R. R. Co., Complainant; and was argued by counsel and submitted—when the Court took time to consider.

98 *Order Refusing Motion to File Plea.*

Extract from the Minutes, November Term, 1903.

NEW ORLEANS, MONDAY, *March* 21, 1904.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
versus
M. K. BITTERMAN ET AL.

The motion of the defendants M. K. Bitterman, Julius Mehlig and C. T. Kelsko, for leave to file a Plea to the Jurisdiction of the

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Court, came on to be heard at a former day, and after arguments of counsel for the respective parties, was submitted:

On consideration thereof, for the reasons orally assigned it is ordered that the motion to file a plea to the jurisdiction at this time be refused.

Motion to Set Down Cause for Trial.

Filed November 10th, 1904.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

No. 13166.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

On motion of Denegre, Blair & Denegre of Counsel for Complainant herein *herein:*

It is ordered by the Court that this cause be set for hearing & trial on Monday the 21st day of November 1904, at 11 o'clock A. M., and that H. L. Lazarus & Girault Farrar Counsel of record for said defendants be notified thereof.

99 *Motion and Order Continuing Case.*

Extract from the Minutes of Monday, November 21, 1904.

No. 13166.

LOUISVILLE & NASHVILLE R. R. CO.
vs.
M. K. BITTERMAN ET AL.

On motion of solicitors for complainant and on suggesting that counsel for M. K. Bitterman, Julius Mehlig and Charles T. Kelsko, defendants, desire a continuance herein, it is ordered that this case be continued to Tuesday, Nov. 29, 1904, at 11 A. M.

Hearing and Submission of Case.

Extract from the Minutes, November Term, 1904.

NEW ORLEANS, TUESDAY, *November* 29, 1904.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.

vs.

MARCUS K. BITTERMAN ET AL.

This case came on to be heard this day *of* final hearing upon the Bill of Complaint. Answer of Marcus K. Bitterman, Julius Mehlig and C. T. Kelsko, defendants. Replication, exhibits, evidence and testimony.

Denegre, Blair & Denegre, solicitors appearing for the complainant.

H. L. Lazarus for Julius Mehlig; Marcus K. Bitterman and C. T. Kelsko, defendants;

Whereupon counsel for the complainant offered the following evidence on its behalf, to-wit:

100 The depositions of John K. Ridgely and George P. Cranmer taken before Henry J. Carter, Special Examiner herein, and the exhibits attached and annexed to said depositions and marked "P. 1" and "P. 2," being sample forms of two tickets, and Articles of Association of Southeastern Passenger Association, marked "P. 3." as per note of evidence on file.

Counsel for the defendants Mehlig, Bitterman and Kelsko, moved the Court to suppress those portions of the testimony to which the defendants objected before the Special Examiner.

After hearing the Solicitors for the parties respectively argue the case, the Court took the same under consideration.

Evidence of Complainant Offered on Trial of Cause as Per Note of Evidence.

Return of Special Examiner, Testimony and Exhibits.

Filed July 15, 1904.

U. S. Circuit Court for the Eastern District of Louisiana, New Orleans Division.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
M. K. BITTERMAN ET AL.

Testimony taken in the above numbered and entitled cause, on behalf of complainants, on 21st day of January, 1904, before Henry J. Carter, Esq., special examiner herein.

Appearances.

Messrs. Denegre, Blair & Denegre, for Complainant;
Messrs. H. L. Lazarus and Girault Farrar, for defendants.

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George F. Cranmer..... " 43

101 Judge LAZARUS: We object to the taking of any testimony at this time pending the consideration of the Demurrer to the Bill; that the answer filed herein was to meet the equities of the bill upon the application for the preliminary injunction.

Judge LAZARUS: Counsel for defendants, notify counsel for complainant that through an oversight the demurrer supposed to have been filed in the case of the Louisville & Nashville Railroad, and filed in the other three cases pending in this court, was not filed; that the demurrer was drawn up, prepared by counsel, duly sworn to, and bore the usual signature of counsel. And solicitor for complainant is now notified that this demurrer will be filed at once.

Mr. BLAIR: Solicitor for complainant denies the right of defendants to delay the taking of testimony by notice of intention to file a demurrer some months after the case had been put to issue by answer and replication.

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JOHN K. RIDGELY, witness sworn and examined on behalf of complainant, testified as follows:

Direct examination.

By Mr. BLAIR:

Q. What is your occupation?
A. I am Division Passenger Agent of the Louisville and Nashville Railroad here.
Q. Where are you located?
A. My office? 702 Common street.
Q. In this city?
A. Yes, sir; New Orleans.
Q. How long have you been in charge of the Passenger Department of the Louisville and Nashville Railroad in the City of New Orleans?
A. Since July 1st, 1901.
Q. Are you at the head of the Passenger Department here?
A. Yes, sir.
Q. I wish you would look at this ticket that is Exhibit A of the bill and state whether that is the form of ticket used on the occasion of the United Confederate Veterans' Reunion?

(Counsel hands witness ticket referred to.)

A. Yes, sir; it is.
102 Q. What reduction in the regular rate of fare was involved in that ticket?

Objection: Judge LAZARUS: Objected to as immaterial at what price the railroad sells its transportation over its lines, as affecting the right of the Railroad Company to control people in the acquisition or disposition of the same wherein no crime is committed.

A. Mr. Blair, the U. C. V. rates made by our line were one cent a mile, which [is] 1/3 of our regular rate; our regular rate is three cents a mile.
Q. Now, I wish you would explain why the original purchasers of those tickets were not required to sign the return portions before using the same?

Objection: Judge LAZARUS: Objected to on the ground that it calls for an expression and opinion of the witness, and unless he can certify or testify that the reason was assigned to each purchaser at the time in his presence, the same is hearsay and objectionable.

A. Owing to the large attendance expected in New Orleans, Mr. Blair, and the fact that a great many of the veterans who were going to take advantage of these tickets were old and feeble men, we thought it would be working an unusual hardship on them had we requested them to stand in line for hours and hours in the hot weather here and where the tickets were sold, and we had to depend largely on the passenger signing the ticket, at that time, to prevent its transfer.

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Q. You mean the obligation contained in the contract of the ticket?

A. Yes, sir.

Q. It is intimated or stated in the answer that one reason for this was to facilitate the original purchaser in negotiating the ticket; is that true?

A. Absolutely not.

Q. Do the round trip tickets or the excursion tickets which you are in the habit of issuing on Mardi Gras festivals or on occasions of conventions or large gatherings require the original purchaser to sign the return portion?

Objection: Judge LAZARUS: Objected to on the ground that this is a bill for the purpose of restraining the negotiations of
103 Confederate Veterans' Reunion tickets and cannot be made the pretext to cover some other and independent arrangement or plan of the railroad companies, and cannot be used as a dragnet for all railroad business, and should be limited and restricted to the Confederate Veterans' Reunion at the time stated in the bill.

A. They do.

Q. Is that the custom in regard to all of your round-trip tickets or excursion tickets, except this United Confederate Veterans' Reunion ticket?

Objection: Judge LAZARUS: Objected to on the ground that it is an attempt to prove custom not communicated to the parties with whom the railroad does business and the custom being general is not admissible.

A. It is a general custom; we generally require them to sign these tickets and I know of no other case where we have been a party to where the tickets have not been signed.

Q. State whether or not the Louisville and Nashville Railroad Company is in the habit of issuing the reduced rate round trip non-transferable tickets on the occasion of the annual Mardi Gras festivals in New Orleans and on other occasions of conventions or large public gatherings in New Orleans?

Objection: Judge LAZARUS: Objected to on the ground that the bill filed here, upon its face, was against the trafficking by the defendants in Confederate Veterans' Reunion tickets, although the language is so artistically used as to cover possibly other cases, and the temporary injunction issued in the case was limited to the Confederate Veterans' Reunion tickets, and they cannot under cover of that bill and that injunction get relief in this proceeding or any evidence admissable, and if the railroad has any rights with reference to future conventions it must be by an original bill and not under cover of the bill whereby they got injunction from the Presiding Judge Aleck Boarman at the time the application was made and heard.

A. Yes, sir; we are in the habit of issuing such tickets.

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Q. What is the form of such tickets in regard to their transferability?

A. The contract on the ticket states most specifically that the ticket is not to be transferred.

104 Q. They are required to be signed by the purchaser at the time of selling them?

A. Yes, sir.

Q. At what rate are they generally issued?

A. For what occasion?

Q. Say, for the Mardi Gras festivals?

A. They are issued as a rule for one fare for the round trip.

Q. What is meant by that?

A. One half of our regular rate.

Judge LAZARUS: All of this testimony is covered by the objections already made and the right is reserved to strike out or suppress.

Q. Are these round-trip excursion non-transferable tickets issued by your road every Mardi Gras?

A. They have been, to the best of my recollection, as long as I have been with the system, with the line, for the last 12 or 15 years.

Q. Do you know whether they are to be issued at the next Mardi Gras?

A. It is our intention to do so.

Q. On what other occasions do you issue regularly these non-transferable tickets signed by the purchaser?

A. We put on every winter coming to New Orleans what we call a round-trip winter tourist's ticket.

Q. Have you a form of such a ticket with you?

A. Yes, sir.

Q. Produce it? (Witness produces form of ticket referred to.)

Q. Have you any of these tickets outstanding and issued now?

A. Yes, sir.

Q. Do you issue them in large quantities?

A. Yes, sir; very large quantities.

Q. Are they required to be signed by the purchaser in this space for the purchaser's name?

A. Yes, sir; in every instance.

Q. Have you the form of ticket which is issued by your road on the occasions of conventions and other large gatherings in New Orleans, at reduced rates?

A. Yes, sir.

Judge LAZARUS: It is understood that the objections heretofore urged cover all this line of examination.

105 Mr. BLAIR: The Round Trip Winter Tourist Ticket is marked by the stenographer R-1.

Q. What reduction from your regular rate is this ticket issued?

A. We make different rates for this ticket from different points of the country; it is, ordinarily, about a 2/3 rate.

Q. What do you mean by a 2/3 rate.

A. Well, if the rate, for instance, from Louisville down here, was

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$18.00 each way, we would sell a round-trip ticket for, say $24.00; that would be a fare and 1/3 for the round trip.

Mr. BLAIR: The general form of round-trip tickets produced by the witness as used on the occasions of conventions, etc., when reduced rate round-trip tickets are issued, is marked by the stenographer R-2.

Q. What reduction is made in the issuance of this latter class ticket from the regular rate?

A. It depends largely on the occasion. That ticket here, the contract on that ticket, Mr. Blair, is very similar to the contract on the U. C. V. ticket sold at one cent a mile, one fare on that ticket, whatever the occasion requires.

Q. Is it rarely or often that the special rate tickets are issued by the Louisville and Nashville Railroad?

A. Do you mean to this city, Mr. Blair?

Q. Yes.

A. We issue a great many round-trip tickets, as evidence last year by the number of meetings held here.

Q. What has been your experience in the past as to the scalping of these tickets?

Judge LAZARUS: What is the purpose of that question; what is the purpose of that inquiry?

Mr. BLAIR: To prove the averments of the bill in regard to the scalping of such tickets.

Objection: Judge LAZARUS: Objected to on the ground that whatever the experience of the witness is, must be confined to his own knowledge and the railroad companies in disposing of their
106 tickets are without authority to control the acquisition or disposition of the same.

A. We have suffered very largely by scalpers handling the return portions of these tickets.

Q. On all the classes of tickets you have described?

A. Yes, sir.

Q. Have you or your road, acquiesced in the handling of these tickets by scalpers?

A. Absolutely not. We have done everything we possibly could to stop it and prevent it.

Q. Have you ever had these tickets returned to you, taken up or lifted by the conductors on your road?

A. Innumerable times.

Judge LAZARUS: You are speaking of your own knowledge?

A. Of my own knowledge. Tickets have been returned to me by the conductors who took them from passengers and the passengers stated they came from ticket scalpers in New Orleans whose names they gave.

By Mr. BLAIR:

Q. Have you ever had tickets returned to you that were forged?

Objection: Judge LAZARUS: Objected to unless the witness under-

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takes to connect one of the defendants in this case with the charge of forgery.

A. We have had tickets returned to us that have been signed by others than the original purchasers, taken up by our train conductors.

Q. Can you state what will be the effect of the tendency of failure of the Louisville and Nashville and other railroads to obtain relief from tickets scalping upon their readiness or ability to make special reduced rates when asked for by the people of New Orleans on the occasions of conventions and other large public gatherings?

Objection: Judge LAZARUS: Objected to unless the witness qualified himself as the vice regent of Gold [God] Almighty to speak of the future with knowledge as to what effect it will have on this community.

107 A. Mr. Blair, in so far as the Louisville and Nashville Railroad is concerned, I can say this to you: that we have been very backwards of late in making reduced rates to this city on account of the scalpers, and if we are not given some relief we will naturally be forced to throw greater restrictions around our tickets, which will make more or less hardships of the traveling public, and I don't know whether our officials in Louisville would consider as favorably the putting in of a reduced rate to New Orleans when we are requested to do as we have done in the past.

Q. What can you say as to the amount of pecuniary damages which the Louisville and Nashville Railroad sustains annually from the sale by scalpers of the round-trip non-transferable tickets?

Objection: Judge LAZARUS: Objected to on the ground that there is no element of damages involved in this controversy and no claim here for recovery against the parties arising out of their dealings in tickets issued by the company and which they acquire in the usual course of business.

A. The scalpers succeed unquestionably in getting a large number of tickets over our lines every year running up into the hundreds and possibly into the thousands. We have arrived at the conclusion from the large number of tickets our conductors have taken up, and I should judge that the Louisville and Nashville Railroad suffers every year from fifteen to eighteen thousand dollars or more every year. On this division it is almost that amount.

Q. What proportion of the excursion tickets used by people coming to the Mardi Gras festivals at New Orleans are sold by your road?

A. That is a hard question to answer. Owing to the country though that our line traverses and our connections, I expect we bring here fully one-half of the people that come into the city.

Q. From the best of your knowledge and experience, do you bring more or less than any other one road?

A. I think we bring more.

Q. Are these Mardi Gras tickets issued in the usual form every year as far as the contract and the other terms of the ticket are concerned?

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A. Yes, sir; with our line they are.

108 Q. Are the tickets that are to be issued this coming Mardi Gras printed yet?

A. They are in the hands of our printer now, Mr. Blair.

Q. You are not able to produce one now?

A. No, sir. They are printed in Louisville, at our printing office in Louisville, where are [our] tickets are printed.

Q. They have not been printed yet?

A. No, sir.

Q. During your connection with the Louisville and Nashville Railroad, have you ever had any dealings with Ticket Scalpers or sold them any tickets?

A. Mr. Blair, we absolutely have no dealings with them. But if a scalper walks into our office and lays his money on the counter and wants to buy a straight one way ticket we are forced to sell it to him; the laws forces us to do that.

Q. Have you ever given them tickets of the Louisville & Nashville Railroad to sell?

A. Absolutely not, Mr. Blair.

By Judge LAZARUS:

Q. Do you speak for yourself or your road?

A. For myself.

By Mr. BLAIR:

Q. Has any employee, under you, to your knowledge and during your term of office, been permitted to have any dealings with Ticket Scalpers?

A. No, sir; they have not.

Q. Suppose it came to your knowledge that any subordinate in your office had had any dealings with Ticket Scalpers, since you have been in office, what would you have done with him:

Objection: Judge LAZARUS: Objected to on the ground that it invited an expression and opinion of the witness as to what his course of conduct would be on a *superstitious* case.

A. The man would be discharged immediately from the service of the Louisville and Nashville Railroad, Mr. Blair.

Cross-examination.

By Judge LAZARUS:

109 Q. While no subordinate has dealt with scalpers, you say, during your administration and to your knowledge, what have you to say with reference to your superiors? Do you know, and do you undertake to say, that no one higher in authority than you has dealt with scalpers in selling them tickets and through them as a medium placing the tickets before the public?

A. I am positive they have not.

Q. That is positive?

A. I am positive they have not.

By Mr. FARRAR:

Q. You are speaking of your present superior?

A. Yes, sir; I am satisfied that Mr. Stone has had no dealings with scalpers in the way of handling tickets or the selling of our tickets.

By Judge LAZARUS:

Q. You are positive that nobody higher in authority than yourself has at no time negotiated and dealt with people who took your tickets and sold them on the market and people that you denounce as scalpers?

A. I can only answer since I have been connected with the Louisville and Nashville Railroad.

Q. How many years is that?

A. Since 1888, possibly 15 years.

Q. Since that time you answer positively?

A. To the best of my knowledge and belief there has been none of our superior officers.

Q. Then you have no positive knowledge?

A. I say to the best of my knowledge and belief.

Q. What do you mean, that you have no knowledge?

A. No, sir; nothing of the kind. I have considerable knowledge of the workings of the Passenger Department of the Louisville and Nashville Railroad, and as far as I know there have been none of our officers or employees that have done so or even considered the advisability of doing so.

Q. It could have been done without your knowledge?

A. Why, hardly. For this reason, Judge Lazarus, as I have been an outside man for the last ten or 12 years, if we had dealings with scalpers I should imagine it would be to the advantage of our General Passenger Agent to have all of us aware of those conditions.

Q. You draw that inference from your position and your
110 relationship with those people; but you don't undertake to swear positively that there has been no such dealings?

A. No, sir; I cannot swear positively, Judge Lazarus, but I am satisfied there have not been.

Q. When you made the rates for these different excursions, is it not a remarkable coincidence that the rates from the same points on all the different roads should have been exactly the same?

A. I don't know, sir.

Q. It was just the coincident of chance?

A. It has been customary for a number of years past, as you are aware, Judge Lazarus, to make a very low rate for the Confederate Veterans to the City of New Orleans. They had requested us; they came to us and asked us to make them the same rate as in years gone by, a cent a mile, which was done.

Q. Did the Confederate Veterans ever come here before last year or year before last?

A. I think they did. I am not sure.

Q. Don't you think it is a remarkable coincidence, and does it

not strike you that roads from the same point to the same territory should all have exactly the same rate per mile to come and go?

A. No, Judge Lazarus, I do not; when the Confederate Veterans went to these different lines and requested them to make this cent a mile rate.

Q. Whom did they go to first?

A. I can't answer that, Judge Lazarus.

Q. From whom did you get directions to make this cent a mile rate?

A. From our General Passenger Agent.

Q. Who saw him, do you know?

A. No, sir.

Q. Do you know what other General Passenger Agents he saw before the rate was established and fixed?

A. It would make no difference, Judge Lazarus, what other General Passenger Agents he saw, that would have no influence on Mr. Stone at all.

Q. Answer the question?

A. Do I know what other General Passenger Agents he saw before he named this rate?

Q. Yes.

A. I have not the faintest idea, Judge Lazarus.

Q. Do you know whether he saw any or not?

A. No, sir.

111 Q. Don't you know, as a matter of fact, that the rate was fixed as a result of a common agreement between the parties?

A. I know, as a matter of fact, it was not fixed by the Louisville and Nashville Railroad by any such agreement.

Q. Where is the Southwestern Passenger Association?

A. I don't know; I never heard of that Association.

Mr. FARRAR: The Southeastern——

Q. The Southeastern Passenger Association?

A. Atlanta, Georgia.

Q. Who composes that Association?

A. Different railroads in the South.

Q. Is the Louisville and Nashville a member of that Association?

A. Yes, sir.

Q. Who is its representative on that Board?

A. Mr. Stone, our General Passenger Agent.

Q. What other roads are members of that Association?

A. Mr. Lazarus, all of the lines practically, in the South, are members of the Southeastern Passenger Association; there is the Southern Railway, there is the New Orleans and North Eastern, the Atlantic Coast Line, all of the lines practically in that section of the Country are members of it.

Q. Who represents the Southern Railway in that Association?

A. I think Mr. Hardwick.

Q. Who represents the New Orleans and Northeastern in that Association?

A. Mr. Smith, of the New Orleans and Northeastern Railroad.

Q. What is he, General Passenger Agent?
A. Yes, sir.
Q. What is Mr. Hardwick, General Passenger Agent?
A. Yes, sir.
Q. Who represents the Mobile and Ohio in that Association?
A. Mr. Shepard, of the Mobile and Ohio is a member of it. I am not sure whether it is a member of it.
Q. Is he a General Passenger Agent?
A. Yes, sir.
Q. Don't you know all the members of that Association?
A. No, sir.
112 Q. Don't they issue the tariff rates?
A. Each road, individually, Judge Lazarus, issues a tariff of rates.
Q. Have you not got the proceedings of the Southeastern Passenger Association?
A. What do you mean by proceedings of the Southeastern Passenger Association.
Q. The actions of the general passenger agent or the representatives of the several roads composing that association?
A. I have not.
Q. Is there one in existence?
A. You mean the proceedings of each meeting they have?
Q. Yes.
A. Why, I presume there—Not to my knowledge.
Q. Is there any way of your ascertaining and furnishing us with the information as to who compose the Southeastern Passenger Association?
A. I think you can find that out from the official railroad guides It is a matter of public record. It is published in every guide you see laying on a railroad counter.
Q. As to who compose that association?
A. Yes, sir; of all the railroads that compose it.
Q. And who are the representatives of the railroads composing the association?
A. No, I don't think that the official guide will show you the name of each gentleman who represents his line, who ordinarily represents his line, at the meetings. With our line, it is our passenger agent, if he goes. Very frequently he is not in attendance at the meetings.
Q. Has this association got a chairman?
A. Yes, sir.
Q. Has it a secretary?
A. I think so; yes sir.
Q. Has it other clerks?
A. I think so.
Q. Are they compensated for their services?
A. Yes, sir.
Q. Do you know how they are compensated and by whom?
A. The expenses of that association, if I understand correctly, are divided, of course, between the lines members of the association.

Q. Proportionate to their mileage, or proportionate to their earnings?

A. That is something I can't answer.

113 Q. Did you ever attend one of the meetings of this association?

A. Yes, sir.

Q. Was the subject of rates at the meeting which you attended discussed?

A. You mean—In what way, Judge Lazarus?

Q. What the rate should be from different points upon the road to certain points?

A. You mean to ask me if the roads got together and agreed jointly and severally to make a rate between certain points?

Q. No, sir; because I know how you would answer that. I want to know whether the matter was discussed at the meeting which you attended.

A. I don't remember attending a meeting of the Southeastern Passenger Association where our line was sufficiently interested to discuss any rate.

Q. At the meeting which you did attend, were the rates for passenger traffic discussed over other lines and comparisons made with advantages on your line?

Objection: Mr. BLAIR: Solicitor for complainant objects to this testimony as perfectly irrelevant and incompetent.

A. I have no doubt there was considerable discussion.

Q. How far is it over your line from here to Louisville, Kentucky?

A. 811 miles.

Q. How far is it over the Illinois Central line?

A. I don't know their mileage.

Q. How much better time do you make from here to Louisville—that is, your road than the Illinois Central?

A. We make practically the same time.

Q. Don't you do a little better in time?

A. They do a little better than we do, Judge Lazarus.

Q. Is not your equipment as good and as efficient and your roadbed as good as the Illinois Central's?

A. I think so.

Q. Now, you say the time between the points named is practically the same?

A. Practically the same?

Q. There is no material difference?

A. There is very little difference on our morning train out of here.

114 Q. Was that time arrangement the result of any agreement or understanding that you should not run faster than the Illinois Central, or that they should not run faster than your line?

Objection: Mr. BLAIR: Solicitor for complainant objects to this testimony as utterly irrelevant and incompetent.

A. On the face of that, if you take our night train out of here, you know, and the Illinois Central, it is about ten hours difference in time; so there could not possibly be any agreement.

Q. I speak only with reference to the limited trains—your fast limited and the Illinois Central's fast limited.

A. To the best of my knowledge and belief, Judge Lazarus, there is no such agreement.

Q. Don't you know, as a matter of fact, that the distance over the Illinois Central from New Orleans to Louisville is greater by 50 or 100 miles than over the Louisville and Nashville?

A. I don't know their exact mileage.

Q. Don't you know it is a greater distance?

A. No, sir.

Q. And you have been general passenger agent for how many years?

A. Why, there is a slight difference in mileage; but I am not paid to look up the mileage of the Illinois Central. That is handled largely by our general manager in Louisville.

Q. It is not a question of mileage, but in advancing the interests of your company. Don't you advocate your road on its being shorter in mileage than other roads?

A. We don't advocate it to Louisville.

Q. How about Cincinnati?

A. No, sir. The Illinois Central puts them—they beat us on our morning train to Cincinnati. We get there at 12 o'clock and they get there at ten o'clock. They beat us two hours.

Q. But on the limited train.

A. I am speaking of the limited train.

Q. The fare from here to Louisville over the Illinois Central and the fare from here to Louisville over the Louisville and Nashville is identically the same?

A. Yes, sir.

115 Q. Is it based upon mileage?

A. Those rates are made in our Louisville office. I am not familiar with the making of them and have nothing to do with it.

Q. I thought you said, in answer to Mr. Blair's question, that you had a regular mileage charge, and that when you gave excursions, or, rather, issued these tickets for excursions, Mardi Gras, Confederate Veteran Reunion, etc., you abated your regular mileage charge. Is that right?

A. Yes, sir. When I said that we do it, I am not referring to myself individually. I am referring to the line. I know the general custom in making Mardi Gras rates, and you know and every gentleman in this room knows. But when you come down to making freight rates on local points on the Louisville and Nashville, rates in effect every year, those rates are made in our Louisville office.

Q. Is it not a remarkable coincidence that the rate of fare should be exactly the same on both roads, although the mileage of one is greater than that of the other?

A. You can very readily understand it. I don't see how there could be a difference in the rate, because if we named a $19 rate to

Louisville, the Illinois Central certainly couldn't get the business if they charged $30. You wouldn't travel over that line and pay them more than you pay us.

Q. Is it not a fact that these rates are the result of understandings express or implied, between the competing lines?

A. Not to my knowledge.

Q. Is it not a fact that the Southeastern Passenger Association, composed of the roads of the various roads, arrange, fix and determine the rates to be charged for transportation over the respective lines, with a view to avoiding a cutting of rates as among the lines, and so that each should get a fair proportion of the business travelings over the respective lines?

A. They have absolutely nothing to do with the fixing of the rates of the Louisville and Nashville Railroad. If our line wishes to make a rate less than the rate in effect or make it more, Mr. Stone makes it himself, regardless of what the Southeastern Passenger Association might do.

Q. Then what is the purpose of the existence of this Southeastern Passenger Association?

A. The articles of the Association explain that very fully.

Q. I call upon you to produce a copy of the articles.

A. Have you a copy of them, Mr. Blair? I am not a mem-
116 ber, personally, of the Southeastern Passenger Association.

Mr. Blair: In answer to the call of solicitor for defendants, there is produced a printed copy of the articles of association of the Southeastern Passenger Association, dated October 22nd, 1900; rules of the Conference Committee, dated November 19th, 1902, which document is marked R-3.

Q. You produce this from the hands of your counsel as the articles of association of the Southeastern Passenger Association?

A. Yes, sir.

Q. Are you prepared to say that these are the only articles?

A. I propose to say that those are the articles of the Association now in effect.

Q. And the only ones?

A. Yes, sir.

Q. There are no private articles which the public does not see?

A. Not to my knowledge.

Q. This is issued for the public?

A. I presume so. What does it say on there?

Q. Southeastern Passenger Association is printed——

A. There is no secret about it at all.

Q. It was intended to be issued for the public?

A. I should judge so.

Q. You don't undertake to say that this is the only agreement that these railroads have?

A. They have no agreement, that I know of.

Q. They have no association at all?

A. They have an association; but an association does not necessarily make an agreement.

Q. What is the purpose of their association?

Objection. Mr. BLAIR: Objected to on the ground that the printed articles of association speak for themselves.

A. The articles of association explain themselves.
Q. You don't know that these are the only articles of association?
A. To the best of my knowledge and belief they are, sir.

Q. You spoke of your conductors taking up forged tickets,
117 or tickets not signed by the parties to whom they were issued?

A. Yes, sir.

Q. Do you mean to charge that as against Mr. Kelsko, Mr. Bitterman or Mr. Mehlig?

A. I can only say this to you, Judge Lazarus. That in enumerable instances we have had tickets lifted on our trains by our conductors, what we call non-transferable signature tickets or tickets sold at a reduced rate and the passenger agreeing in buying that ticket at this reduced rate that it would not be transferred and the passenger would use it in both directions and would under no conditions sell it. We have tickets of this description lifted on our trains by our conductors and the passengers holding the tickets in a number of instances stated that they were purchased from scalpers and they were required to go to the ticket office and sign the name appearing on the face of the ticket.

Q. I understand that from your direct examination. I ask you again do you mean to charge that on the defendants in this case, Kelso, Bitterman and Mehlig?

A. I don't know of any particular case myself now. I am not referring to any particular incident myself personally where that has been done by either one of the three men. My simple reason for this is, if I should say yes they had done it you would then require me to produce the particular ticket or refer to a particular case and that I am not prepared to do.

Q. I don't want any argument; I simply want to know the fact?
A. I am trying to give you an answer.
Q. The answer was I don't know or I do?
A. The gentleman has my answer there.
Q. The Southeastern Passenger Association has a branch here, has it not?
A. The New Orleans Passenger Bureau you refer to?
Q. Yes?
A. Yes, sir.
Q. You are a member of that?
A. Our line is a member of it.
Q. And all the other lines centering here are members of it?
A. I can't say that they all are. The Southern Pacific is not a member of it.

118 Q. Leave the Southern Pacific out; are there any other exceptions you want to make?

A. A number of these smaller lines are not members of it; but the trunk lines coming into New Orleans, with the exception of the Southern Pacific, are members of it.

Q. Is the Illinois Central a member of it?
A. Yes, sir.
Q. Is the Louisville and Nashville a member of it?
A. Yes, sir.
Q. Is the New Orleans and Northeastern a member of it?
A. Yes, sir.
Q. Is the Yazoo and Mississippi Valley a member of it?
A. That is the Illinois Central.
Q. That is part of the Illinois Central?
A. Yes, sir.
Q. What is the office and what are the duties of this association?
A. They are explained there fully also in the articles of association.
Q. You get your directions however from the Southeastern Passenger Association?
A. I get my directions from Mr. Stone, our General Passenger Agent. The Southeastern Passenger Association have absolutely nothing to do with me.
Q. Where does Mr. Stone get his directions from?
A. From himself.
Q. You are sure he does not get them from the Southeastern Passenger Association?
A. Absolutely, yes, sir.
Q. You are prepared to say that before Mr. Stones issues directions to you as a member of the New Orleans Passenger Association that it was not the result of any understanding or agreement emanating from those composing the Southeastern Passenger Association?
A. Yes, sir; I am.
Q. And that in giving you those directions he acts independently?
A. Absoluetly.
Q. And not in concert with his associates of the Southeastern Passenger Association?
A. He does not act in concert with them at all.
Q. The Southeastern Passenger Association is rather a harmonious body?

A. As I have stated to you before, Judge Lazarus, I per-
119 sonally am not a member of the Southeastern Passenger Association.

Q. I didn't mean that. I mean to say the New Orleans Passenger Bureau is a harmonious association?
A. We are members of the New Orleans Passenger Bureau and I represent the Louisville and Nashville Railroad at their meetings; but I attend so seldom, it is so seldom that I am there, that I ever go there, that I am not prepared to answer you whether their meetings are harmonious or not but I should imagine——
Q. But whenever you were there they were perfectly harmonious?
A. Not at all times.
Q. Didn't you act all together and in concert under the directions of your respective General Passenger Agents?
A. I can only answer for our General Passenger Agent, and I always act under his directions.

Q. Wasn't there a harmony of action when you acted under his directions, by other members of the association?

A. No, sir; not always.

Q. Can you recall when there was any difference?

A. No, sir; not at the present time cite any particular case; as I told you before, I don't think I attended a meeting of the New Orleans Passenger Bureau twice in the last year and a half.

Q. When you did attend, can you recall any controversy that you had with the representative of any other line who was a member of that Bureau?

A. No, sir; I cannot; I recall nothing about any of the meetings that I attended.

Q. And if any controversy, serious controversy, had taken place, you would have remembered it?

A. Possibly.

Q. Does not this Southeastern Passenger Association send out circulars of rates over the different lines?

A. Do you mean rates made by the Southeastern Passenger Association?

Q. No; they do not send it out as rates made by the Association; but do not rate sheets come from this Association giving changes in the rates over the different lines?

A. I can only answer for our line. Mr. Richardson, the Chairman of the Southeastern Passenger Association is an employé
120 of the Louisville and Nashville Railroad, and if Mr. Stone wishes to let our connections know that a rate is to become public, to be made, or put into effect, for any particular occasion, he notifies Mr. Richardson of his intention and that gentleman gives as much publicity to this rate as he can.

Q. What position does he occupy with the Southeastern Passenger Association?

A. As I stated to you, Judge Lazarus, he is chairman of the Southeastern Passenger Association.

Q. Is it not a fact that when those sheets come out, as you have described and emanated from the source you have stated, don't they also give rates over the other lines?

A. It depends altogether whether Mr. Richardson has been instructed I presume by the General Passenger Agents of the different lines. We frequently see a circular issued by Mr. Richardson simply stating that Mr. Stone has notified him that he proposes making a rate between certain points on a certain date. This is given to the connections of the Louisville and Nashville for their information.

Q. Well, but, when the rate that Mr. Stone fixes is not limited to a locality where your road has no competition or where you have not a competing line, but gives rates from certain points to certain points on your line where there is competition and where you have rival lines, do not the rates that emanate from Mr. Richardson, whether under the directions of the General Ticket Agents of those respective lines, are they not all enumerated at the same time?

A. You mean all make the same rate?

Q. Yes?

A. No, sir; not in all cases. I have known of several instances where circulars have been issued by the Southeastern Passenger Association and where Mr. Stone has given notice that he would not transfer or make certain rates, they would either be higher or lower than the rates made by other lines.

Q. Those instances to which you refer are exceptional. I ask you now to answer the question with reference to the sheets that were issued by Mr. Richardson generally?

A. Generally the rates are the same; but each line acts independently of the notice they make of the rate. The Southeastern Passenger Association has nothing to do with it.

Q. I understand you to say that Mr. Richardson is simply a medium between the members of the Southeastern Passenger Association?

121 A. Yes, sir.

Q. What they all do appear on the same sheet and the rates generally speaking are the same?

A. They are forced to be the same, for the simple reason that one line cannot succeed in doing business at a higher rate than the other lines.

Q. That is perfectly logical; but the fixing of these rates is purely accidental and co-incidental not the result of any agreement or understanding between the respective representatives of the different railroads?

A. As I stated to you a while ago, to the best of my knowledge and belief they are not. I am not the General Passenger Agent of the Louisville and Nashville, that is Mr. Stone at Louisville. I know, as far as our line is concerned, that he absolutely names his own rates regardless and independent of any other line.

Q. The rate, say from Louisville to New Orleans, is the same over the Illinois Central as it is over the Louisville and Nashville and ——

A. Yes, sir.

Q. Over the Mobile and Ohio?

A. No, sir; I don't think they go in there; the Southern Railway——

Q. Over the Southern Railway?

A. Yes, sir.

Q. Those three lines are all the roads practically between Louisville and New Orleans?

A. Yes, sir.

Q. And the rates are the same?

A. Yes, sir.

Q And the rates are the same from Cincinnati to New Orleans on all the lines going out of Cincinnati to New Orleans?

A. Yes, sir.

Q. And from Memphis to New Orleans?

A. Yes, sir.

Q. And from all other points?

A. I can't say from all points.

Q. I say from all other points where lines compete?

A. No, sir.

Q. Give us a case where the rates differ from a point of departure where there are rival lines?

A. Why, the only one I can think of now—if I had a New Orleans rate sheet here I could show you a number of them.

122 But we will take Parkersburg, West Virginia, I think that is a local point on the Baltimore and Ohio, and unless I am mistaken, it will cost you 50 cents more to buy a ticket over the Louisville and Nashville from New Orleans to Parkersburg than it will over the Illinois Central.

Q. Difference of 50 cents?

A. I think that is the difference.

Q. I am speaking of large metropolitan cities like Louisville, Cincinnati, Chicago, Memphis, Washington, Nashville, Philadelphia, New York, cities of that character?

A. Well, the rate from New Orleans to Baltimore, you can go by the Illinois Central to Cincinnati, *and* the Baltimore and Ohio 50 cents less than by our line.

Q. What is the difference in the time?

A. I am speaking of using the Louisville and Nashville trains from here to Cincinnati and the Baltimore and Ohio from Cincinnati on, and using the Illinois Central trains from here to Cincinnati and the Baltimore and Ohio from Cincinnati on. The time is practically the same.

Q. Is not the Pennsylvania Road the connecting line of the Louisville and Nashville at Cincinnati?

A. No more than any other line going out of there.

Q. You enter the same depot?

A. We enter the same depot with the Baltimore and Ohio also. We enter the Grand Central Station in Cincinnati and also the Pennsylvania Station; we go into both stations.

Q. Does the Southeastern Passenger Association issue rate sheets on different roads beyond their own lines and where they have connecting carriers, or do they limit their sheets to the railroads covering their own lines?

A. Do you mean, does the Southeastern Passenger Association issue rate sheets showing rates from Chicago to Omaha for example? No, sir; they only issue rates in their own territory.

Q. And over lines controlled by the roads entering here? In other words, to make myself plain. I want to get the facts, that is all. The Louisville and Nashville owns its own line from here to Cincinnati?

A. Yes, sir.

Q. It controls that line?

A. Yes, sir.

Q. The Illinois Central controls its own line from here to Cincinnati?

A. From here to Louisville.

123 Q. We will take Louisville as the basis of the question?

A. Yes, sir.

Q. The Louisville and Nashville controls its own line from here to Louisville?

A. Yes, sir.

Q. And the Illinois does too?

A. Yes, sir.

Q. Now, at Louisville, the Louisville and Nashville and the Illinois Central have connecting lines?

A. Yes, sir.

Q. The rate sheets that are issued by this Southeastern Passenger Association simply covers the travel from here to Louisville and makes no reference to connecting lines unless the lines connecting are lines owned by the companies?

A. No, sir; you are mistaken.

Q. That is what I want to be informed upon?

A. For instance, if the Louisville and Nashville Railroad should take up with the Chicago, Eastern and Illinois Railroad, the subject of a reduced rate from New Orleans to Chicago and the C. E. and I. would agree to let the Louisville and Nashville name this reduced rate over their rails. Mr. Stone would then notify the Chairman of the Southeastern Passenger Association that he proposed making a ten-dollar rate, say from here to the City of Chicago, and he would sell tickets at that rate and give the C. E. and I. Railroad their proportion of it.

Q. Then the Southeastern Passenger Association would announce the rates not only over the lines of which their officers are members, but over connecting lines as well when so instructed?

A. The Southeastern Passenger Association would have nothing to do with it. As far as the Louisville and Nashville was concerned, Mr. Richardson, as our agent and our representative, would naturally collect any rate he is instructed to collect by his superior officer, who is Mr. Stone, the same as I would.

Q. Read the question to the witness?

A. The notice is issued by Mr. Joseph Richardson as Agent of the Louisville and Nashville.

Q. Does he not sign those notices as Chairman of the Southeastern Passenger Association?

A. I cannot answer you that question; but if you will go by my office or send around there I will send you one of the circulars; I will be glad to do it.

124 Q. I have some of the circulars?

A. You are aware then of how he signs them.

Q. You have some of those circulars at your office?

A. I think so; there should be some there.

Q. Will you send them to your counsel and he will submit them to me and file them in the record?

A. Yes, sir.

Q. Besides being an employee of the Louisville and Nashville Railroad, you say Mr. Richardson is Chairman of the Southeastern Passenger Association?

A. He is—I think his title is Chairman—is the Chairman or Secretary; Mr. Blair, do you remember?

Q. What position does Mr. Richardson hold with the Louisville and Nashville Railroad?

A. He is Agent for the Louisville and Nashville in Atlanta, Georgia.

Q. What do you mean, Ticket Agent?

A. No, sir; Agent; just Agent like our man is in the City of Chicago.

Q. They are agents?

A. Yes, sir.

Q. Do you know what his duties are?

A. His duties consist in giving information and following out the instructions given him by our General Passenger Agent.

Q. Are the duties with which he is charged, to your knowledge, evidenced by any writing?

A. No, sir; they are not, so far as I know.

Q. They might be in writing and you not know it?

A. Mr. Richardson is engaged by Mr. Stone in Louisville personally, and of course a man in my position would know nothing about that.

Q. Do you know what his compensation is?

A. No, sir.

Q. Do you know what compensation he receives from the Southeastern Passenger Association?

A. No, sir.

Q. Have you ever heard it discussed?

A. No, sir.

Q. Where are the offices of this Association in Atlanta?

A. I think they are in the Equitable Building.

Q. Have you ever been there?

A. Yes sir.

125 Q. How many rooms do they occupy?

A. They occupy several rooms, the exact number I can't tell you; I don't know.

Q. Do they occupy something like nine rooms?

A. I hardly think they occupy over four, three or four rooms, I have been in three or four rooms connecting with one another. I am not aware of any more.

Q. How many clerks are employed there?

A. That is something I can't tell you, the number of clerks; they have several office men there; some three or four office men working in there; what other clerks they have I don't know.

Q. It is quite an active office, is it not?

A. There is considerable work in there, I should judge.

Q. Do you know whether they are advised and whether they keep a record of the passenger traffic of the different lines constituting that association?

A. I am satisfied they don't keep a record of the traffic of our line, the Louisville and Nashville.

Q. You report as Local Passenger Agent to Mr. Stone?

A. I report as Division Passenger Agent to Mr. Stone.

Q. Are you prepared to say that Mr. Stone does not furnish them that information?

A. Mr. Stone reports to our Traffic Manager. I can't see what

the Southeastern Passenger Association has to do with all the traffic we move.

Q. The question is whether, as a matter of fact, reports are made by your company through Mr. Stone, or through the Traffic Manager of your road, to the Southeastern Passenger Association?

A. The only answer I can give you is, I am satisfied they are not.

Q. That means to say if there were you would know it?

A. I think in all probability I would. It is no more than natural to suppose I would.

Q. Then you are simply conjecturing and not testifying from any positive knowledge one way or the other?

A. Except I am satisfied they are not. I cannot swear they are not, but I am satisfied that is not the case.

Q. Do you know upon what basis the roads are assessed for the maintenance and operation of this Southeastern Passenger Association?

A. What salary Mr. Richardson draws from the Louisville and Nashville I am not aware of.

Q. I am not asking you about salaries. We have got past
126 that. I asked you if you knew on what basis the different roads composing this association are assessed and contribute to its maintenance and support?

A. I don't know what our proportion of the expense is.

Q. I didn't ask you that. I repeat the question to you. Do you know upon what basis the different roads composing this Association are assessed and contribute towards its maintenance and support?

A. I do not.

Q. You don't know whether it is the earning capacity of the road through its passenger traffic, whether it is its mileage, or what the basis is?

A. I am not able to answer that question.

Q. You know there is a contribution?

A. No, sir. I know that the Louisville and Nashville very naturally would pay their proportion of the expense in maintaining any kind of a Bureau anywhere that they were interested in.

Q. This Bureau came into existence after the decision of the Supreme Court of the United States in the Trans-Missouri Freight Association case?

A. I don't remember.

Q. You remember when the Trans-Missouri Freight Association was disbanded in Saint Louis?

A. I am in the Passenger Department and know very little about the Freight Department or what they are doing.

Q. You never heard of that case being decided?

A. I don't think I ever heard of the case in my life.

Q. You never heard then of the Traffic Association that was held in Saint Louis——

A. You are speaking now of a Freight Association?

Q. Yes. You never heard of that case?

A. No, sir.

Q. How long has this Passenger Association been in existence?
A. I should say, off hand, for possibly a number of years, the exact number I don't know.
Q. Well, the Trans-Missouri case was decided, if I remember right, about '97 or '98, it may have been a little earlier. Now, a number of years may mean two or three?
A. It may have been further back than that, further back than '97, the association has been [in] existence, unless it has been disbanded and started over again, I don't know.

127 By Mr. FARRAR:

Q. How long have you been Division Passenger Agent of the Louisville and Nashville Railroad?
A. In New Orleans?
Q. Yes?
A. Since July 1st, 1901.
Q. You were then a member of the Bureau in March, 1902?
A. Yes, sir.
Q. Do you remember the occasion when the Bureau issued a circular addressed to each one of the railroads or their officials who were members of the Bureau, providing a reduced rate from New Orleans to Memphis, Saint Louis, Little Rock, Nashville, Louisville, Cincinnati and Washington, between certain dates at rates less than the published rates when the tickets were faced Horseman?
A. I remember the rate you refer to; yes, sir.

Objection. Mr. BLAIR: Solicitor for complainant objects to all this testimony as irrelevant and incompetent.

Q. Do you remember also that the circular conveying information as to these rates stated that the rates were not to be advertised?
A. I don't remember the circular at all. I will be very frank with you. The only recollection I have of it at all is by seeing it in your answer to the bill filed last year.
Q. Assuming that it was, a fact, that such circular was issued containing the words "not to be advertised," will you please state what was the purpose in using the words "not to be advertised?"
A. I suppose it was to do away with the unnecessary expense of advertising in the daily papers, the rate, Mr. Farrar.
Q. How could you determine under that circular whether a proposed purchaser of a ticket from New Orleans to Memphis, Saint Louis, Little Rock, Nashville, Louisville, Cincinnati or Washington was or was not a Horseman?
A. There was no such attempt made. We only had one rate on the day those tickets were on sale and whoever came in there to buy one got that rate; there was no question asked as to whether a man was or was not a Horseman.
Q. Why was the ticket to be faced Horseman.
A. That was simply to designate that ticket, let our auditor know at what rate that ticket was to be sold.

128 Q. You are familiar with the provision of the Interstate Commerce Commission requiring all changes in the rates to be advertised, are you not?

A. I am not familiar with the Interstate Commerce law, but I should not imagine that there was anything in the Interstate Commerce law that requires us to advertise in the daily papers a change in a rate to be in effect for only two or three days.

Q. The rates referred to in the circular about which I have questioned you, between New Orleans, Memphis, Cincinnati, Little Rock, etc., were less than the regular rate, were they not?

A. Yes, sir.

Q. The regular rates are posted in the office, are they not, of the different roads?

A. Are regular rates posted in the office?

Q. Yes?

A. I think we have a tariff of our rates.

Q. They are made public?

A. Certainly.

Q. You do not deny, as I understand, that the New Orleans Passenger Bureau issued this circular?

A. No, sir; I do not deny it.

Q. It is asserted in the answer here that the Louisville and Nashville Railroad Company, among others, have had business relations in the sale of tickets with the defendant Kelsko and that Kelsko has had and maintains through the General Passenger Agent and the Division Passenger Agent of the Louisville and Nashville Railroad, traffic arrangements for the sale and disposal of tickets of the Louisville and Nashville Railroad Company. Do you deny that that statement is true?

A. I do not even know the man by sight and I do not think Mr. Stone knows him by sight.

Q. That is not an answer to my question. Do you deny this statement?

A. Most emphatically.

Q. Do you deny it as a matter of positive fact, or do you deny it as a matter within your knowledge?

A. So far as myself is concerned I deny it most emphatically to my certain knowledge.

Q. Who was your immediate predecessor as Division Passenger Agent?

A. Mr. John Kilkenny.

129 Q. Do you deny that Mr. Kilkenny had these relations?

A. I don't know nothing about his relations.

Q. Who was the immediate predecessor to Mr. Stone?

A. Colonel Atmore.

Q. Do you deny that Colonel Atmore had these relations with Mr. Kelsko?

A. As far as I know, Mr. Farrar, he had no relations of that kind with Mr. Kelsko.

Q. Have the Mardi Gras rates, I am speaking now of the rates

from points on the Louisville and Nashville Railroad to New Orleans and return, been yet fixed?

A. We have not received anything official from our Louisville office, but my understanding is that we are going to make or contemplate making a rate of one fare plus 25 cents for the round trip.

Q. Has that decision been finally and determinedly reached yet?

A. I can't say positively as to that. As I stated to you a minute ago, Mr. Farrar, we have received no official circular from Mr. Stone authorizing that rate; but when in Saint Louis last week I understood that rate was to be made by the Louisville and Nashville. We had a meeting at our own office.

Q. Have the conditions under which your tickets will be issued been positively and determindedly settled by the Louisville and Nashville Railroad Company at this time?

A. I can say this much, Mr. Farrar, it will be a signature non-transferable ticket.

Q. How do you know that?

A. For the simple reason that our General Passenger Agent who gives out the contracts and arranges for all tickets, has informed me to that effect.

Q. Then you know by information from your General Passenger Agent?

A. Yes, sir.

Q. Are you able to state positively that the General Passenger Agent will not make some changes in the conditions that you have named, before the tickets are finally put on sale?

A. To the best of my knowledge he will not make any.

130 Redirect examination.

By Mr. BLAIR:

Q. That is the form of ticket that has been issued for the past several years on Mardi Gras occasions?

A. Yes, sir.

Q. Now, referring to this circular about which Mr. Farrar has spoken, is the Interstate Commerce Commission notified of these rates?

A. I presume so, Mr. Blair. They should have been. They are always in cases of that kind notified.

Q. A copy of the tariff is filed with the Interstate Commerce Commission.

A. Yes, sir.

Q. How long since Mr. Atmore ceased to be the General Passenger Agent of the Louisville and Nashville Railroad?

A. Between four and five years.

Q. Since that time who has been the General Passenger Agent?

A. Mr. Charles L. Stone.

Q. Mr. Atmore is dead?

A. Yes, sir.

Q. Mr. Kilkenny has ceased to be connected with the Louisville and Nashville Railroad for how long?
A. On July 1st, 1901, he left the service.

By Judge LAZARUS:

Q. He is not dead?
A. No, sir:

GEORGE F. CRANMER, witness, sworn and examined on behalf of complainant testified as follows:

Direct examination.

By Mr. BLAIR:

Q. What is your occupation?
A. I am Passenger Conductor on the Louisville and Nashville Railroad.
Q. How long have you been a conductor of the Louisville and Nashville Railroad?
A. I have been a Passenger Conductor for the Louisville and Nashville Railroad?

—. ——.

131 A. Between here and Mobile.
Q. During that time what experience, if any, have you had with non-transferable tickets which have been purchased for passage by others than the original purchasers?

Objection: Judge LAZARUS: Objected to on the grounds that it is quite immaterial and irrelevant, unless the witness will undertake to show that the non-transferable tickets emanated from one of the defendants and in their re-sale of the same, if they sold any, that there was a crime committed in the forging of the names of the parties to whom the tickets were originally sold.

A. I lifted quite a number of those tickets.
Q. What efforts did you make and do you make now, to detect scalped tickets or tickets which are being used by other than the original purchaser. I, of course, refer to tickets which are non-transferrable and so designated on the face of the ticket and signed by the original purchaser?

Objection: Judge LAZARUS: Same objection.

A. I make every effort to discover the rightful owner as the cashier of a bank would do to a man that presented a check to him that he didn't know.
Q. Have you ever been instructed or authorized by the Louisville and Nashville Railroad Company to relax your efforts in that regard?
A. To relax them?
Q. Yes. In other words, have you ever been authorized or instructed by the Louisville and Nashville Railroad to pass people on tickets when presented by other than the original purchaser?
A. No, sir.
Q. Tell me some of the methods which you have resorted to in

your efforts to catch on to scalped tickets and what efforts were made by the holders of those tickets to avoid detection?

Objection: Judge LAZARUS: Objected to on the same ground, unless the witness undertakes to identify Bitterman, Kelsko, or Mehlig with the transaction which he is called upon to narrate.

Q. Go ahead and tell us?

132 A. I walk into a coach and I find a pas-enger with a return portion of a round trip ticket. I am merely going to describe the conditions on the train; I am not describing anything outside of it.

Q. Go ahead and just answer the question.

A. I stand by him for a while. It is merely a system adopted of my own, to see whether he is nervous or shaky about property he has got that he has no right to—whether he believes I am going to throw him off the train. It is very evident if a man has in his possession something that he has bought or stolen from somebody——

Q. Go on and tell what you do.

A. I am telling you. He gets uneasy. I ask him to sign his name—his signature. Invariably they can hardly do it to compare with the signature on the ticket. If it does not satisfy me, I ask him for some reference of some kind—some collateral. He pulls out a lot of letters; half of them are blank; there is nothing in them. Two or three of them may have some letter addressed to the party whose name is on the ticket, and the moment I call his attention to the blank envelopes, I throw them down, and he leaves them there or throws them out of the window; he has no further use for them; That is only one instance.

Q. I understand you to say, then, that a person using a ticket issued in the name of somebody else frequently presents you with letters addressed to the party whose name is on the ticket?

A. Yes, sir.

Q. And you examine them and find them to be empty?

A. Worthless—no account.

Q. Have you ever had a passenger own up and say where he got those letters?

A. Yes, sir; nine times out of ten.

Q. Where does he say he got them from?

A. From scalpers.

Q. From scalpers in New Orleans?

A. Yes, sir.

Q. Can you give us the names of any scalpers whom the passenger has mentioned as having got the letters from as a means of identifying him as being the party whose name is on the ticket?

Objection. Judge LAZARUS: Objected to on the ground

133 that it is hearsay unless the witness undertakes to say that the party whose name is mentioned was present when the statement was made.

A. In asking them the question and taking the number of tickets

I have lifted, the parties that peddled them off to these people are Kelsko, Bitterman and Mehlig.

Q. Which of the three sold the most of them?

A. It was horse and horse between Mehlig, Bitterman and Kelso. I don't know which one got the best of it.

Q. Have you ever had any tickets presented to you which were forged or the name had been fraudulently erased?

A. Yes, sir.

Q. How was it done, and how did you discover it?

A. I would just hold it up to the light and I could see.

Q. What did you see?

A. I saw where the ticket had been rubbed off, where the name had been rubbed off the ticket. The rubbing would thin the paper a little. You could easily see where the name had been erased.

Q. Has that rarely or frequently occurred?

A. It has frequently occurred.

Q. Are there any other tricks of the trade you can tell us of?

A. About what?

Q. About the using of these scalped tickets on the train and the efforts of persons using them to disguise the fact that the ticket was scalped?

A. Oh, yes. They would use cigarette paper—take a cigarette paper in their hand and have the name of the ticket on the cigarette paper in front of them.

Q. The name on the ticket?

A. The name that was on the ticket.

Q. They would have it where?

A. On a cigarette paper in front of them. He would have the cigarette paper in his hand and he would notice the cigarette paper and would familiarize himself with the signature while I looked at the ticket, so he could write it right off.

Q. So while you held the ticket away from him, he had the signature on the ticket copied on a little paper before him?

A. Yes, sir; or sometimes on a railroad guide in front of him.

Q. All this occurred going out of New Orleans?

A. Yes, sir.

134 Q. About how many tickets do you lift every year?—that is, do you discover as being used by persons not entitled to use them, and take them up and compel the passenger to pay fare, every year on the occasion of Mardi Gras?

A. About 25 or 20.

Q. You take up about 25 or 30 every year?

A. Yes, sir.

Q. How many passenger conductors are there besides yourself on the Louisville and Nashville out of New Orleans?

A. There are seven besides myself.

Q. What proportion of tickets do you detect so positively that you can take them up, as compared with the tickets that you suspect are scalped, but which you have to pass?

A. I have to pass ¾ of them, I expect.

Q. And you succeed in taking up about 25 per cent.?

A. Yes, sir.

Q. Does this scalping of tickets out of New Orleans occur in the case of round-trip excursion tickets other than Mardi Gras tickets?

A. Any ticket that is a round-trip ticket and has a face signature to it, the chances are of its being scalped when it gets here.

Cross-examination.

By Judge LAZARUS:

Q. Did you ever read Conan Doyle's works?

A. I am acquainted with Conan Doyle. I believe I have read him very carefully.

Q. Then you know his character of Sherlock Holmes?

A. Yes, sir; I know him very well.

Q. So, for the Louisville and Nashville Railroad, independent of your duties as a conductor, you display the skill and ingenuity of a detective?

A. No, I get paid to do that. It is part of my stock in trade.

Q. You can stand over a man and, by watching his conduct, you form a conclusion, and, being master of the situation, your judgment for the time is final, is it not?

A. No, sir.

Q. You stand over a man, and he gives an appearance of uneasiness and resulting nervousness, and you come to the conclusion that the ticket that he presents for his transportation is not property that he should be in possession of?

A. One man.

135 Q. You only did that once?

A. No; I do it on a kind of Sherlock Holmes principle. I go round and round. I adopt different kinds of systems.

Q. You have only given us a sample one?

A. I am giving you one way with one man. I can give you other samples of what I do.

Q. I have no desire to inquire into your art at all.

A. Thank you.

Q. You happen to mention the three defendants in this case as the parties whom you were told by the passenger that he bought these fraudulent tickets from, as you characterize them?

A. Yes, sir.

Q. Was Mr. Kelsko present when that statement was made?

Q. Was Mr. Kelsko present when?

Q. When that statement was made that you have stated?

A. I don't know anything about Mr. Kelsko, only that statement the passenger made to me on the train. I know he is a resident of Louisiana.

Q. Do you know whether he was present when that statement was made?

A. I don't know whether he was there or not. I don't know whether he was on top of the car or under seat. I never looked for Mr. Kelsko. I was looking for the passengers; I wasn't looking for anybody else.

Q. Are you prepared to say that Mr. Kelsko was present when that statement was made, or that the statement was made in his presence and hearing?

A. I am not prepared to answer the question at all.

Q. Was Mr. Bitterman present when that statement was made?

A. I don't know anything about him.

Q. Was Mr. Mehlig present when that statement was made?

A. I don't know anything about him.

Q. Are you prepared to say that they were present on the occasions when these parties whose tickets you lifted made the statement that they had purchased their tickets from Kelsko, Bitterman and Mehlig?

A. I repeated to you verbatim what the passengers told me. I don't know anything about Mr. Mehlig, Mr. Kelsko or Mr. Bitterman.

136 Q. I didn't ask you whether you knew anything about them. You have made a statement here imputing to these men a crime in the forging of tickets, and I want to know from you, as I have a right to know, whether those people were present at the time the statement was made to you and whether they heard it and acquiesced in its truthfulness?

A. I could not swear whether they were present or not. I never looked for them; I was looking for the passengers.

Q. Do you know either one of them?

A. I think I might know Kelsko if I saw him. Bitterman or Mehlig I don't know. I don't know anything about them.

Q. At the time that you refer to, the train was moving, moving out of New Orleans for some distant point?

A. Yes, sir; it was moving.

Q. Did the men who made the statement to you, or either of them, that they had purchased the tickets from Kelsko, Bitterman or Mehlig, state to you that either one of those men were present?

A. I never asked them whether they were or not.

Q. I didn't ask you whether you asked them the question. I asked you, did they say when they made the statement that the tickets upon which the forged signature was and the ticket which was erased and the ticket which they said they bought of Kelsko, and another one stated he bought of Bitterman, and another one stated he bought of Mehlig—did those at that time state to you that those men were present?

A. I don't know anything about Mr. Kelsko or Mr. Mehlig or Mr. Bitterman.

Q. You have said that, Mr. Conductor, four times, that you didn't know anything about them?

A. Yes, sir.

Q. I asked you whether the men that made the statement to you at the time when they made it, state that either of the men that sold them the tickets was present?

A. I don't know anything about it. I can't answer your question.

Q. You went to a man and looked at his ticket. You told him

that was not his name. He told you he had bought the ticket of A, B or C—

A. You are going too fast.

Q. What did he tell you?

A. I will tell you. You are telling me what he told me——

Q. I want you to tell me what he said.

A. I will certainly do so. After I got through with him,
137 with his signature, it is necessary to give him a receipt to try and protect him to get his money back.

Q. Then you are not only a detective, but a Samaritan?

A. No. To get his money back for the ticket he had bought. I will tell you about this. I will tell you how the facts come in. I will tell you all about it. I will stand all your knocking, Judge Larazus, if you will wait a bit. You and I are not in the same boat. I say to him: I will give you a receipt for the money that I collect from you, and also for your ticket. All right. I make out a receipt for the money and a receipt for the ticket. Now here are the facts; here are where the facts come in. He will say to me, I bought that ticket from a scalper, and I want to get my money back. All right. I had the ticket that he presented for transportation in my hand with George Crammer on it, say, or John Smith, put it down John Smith. Now, I will say to him: I will not give you this receipt and make it out under the name of John Smith on this ticket. I will not give you any chance for this scalper to pay your money back unless you give me your name, and he gives it. That is how I find it out.

Q. I will go back to the question. When that is all done, you ask him from whom he bought the ticket?

A. I ask him: Where did you get this ticket? He says: I bought it from a scalper.

Q. And that is all the interest you have in the matter?

A. Well, it is all the interest I have for the time being. After we get along a while—you know, any man will get a little offended that has to put up money a second time, and it is part of my stock in trade to rub a little oil on his feelings and jolly him along on his journey, and make it pleasant for him. I am paid for that, as well as I am paid to get the money out of him. I talk to him and say to him: Who did you get this ticket from? Out of 25 or 30 tickets I take up—I can't state positively the number—but the answer invariably falls to Kelsko, Bitterman or Mehlig. Now, as far as your question to me about whether Mr. Mehlig or Mr. Bitterman or Mr. Kelsko was present, I don't any more know whether they were present or whether you, Judge Larazus, was present. Although I have heard so much about you, I would not know you if you were pointed out to me, even if you were sitting in the seat. As far as your question goes, whether they were there or not, I can't answer. They may have been sitting by the seat and may not. It is useless to force me to answer something I can't answer.

138 Q. The man, for instance, that told you he got the ticket from Kelsko—did he say to you, Kelsko is there?—indicate to you in the car that Kelsko or Mehlig or Bitterman was there?

A. I don't suppose the question was ever brought up whether Kelsko was there. He told me he got it from Kelsko.

Q. I simply want to——

A. You want to show by me that Kelsko and Mehlig and Bitterman were in the City of New Orleans, and not on the train or anywhere around. Well, I can't state whether they were or not. It is up to you and I to talk here all evening on that point, and we wont get any nearer to each other.

Q. Who are the men—give me their names—whose tickets you took up under the circumstances you have narrated, and who informed you that they purchased these tickets with forged signatures from Kelsko, Bitterman and Mehlig?

A. I can't do that.

Q. You took their names?

A. No; I put their names down on the receipts that I handed to them for the tickets that I lifted from them.

Q. Then they gave you their names to write in the receipts?

A. In their receipts.

Q. And that receipt went back in the hands of the company when they paid the money?

A. No, sir; in the hands of the scalper. That receipt was for the man to get his money back.

Q. Don't the company pay those receipts?

A. The company don't pay for any ticket a scalper sells.

Q. Then the company issues those receipts or authorizes their issuance to enable the traveler that if his ticket is scalped, he can go to the scalper and get his money back?

A. No, sir.

Q. What is the purpose of these receipts?

A. The purpose is, if you get on the train leaving New Orleans without a ticket, and I charge an excess of one cent a mile, $5.65, you ask me for a receipt for that money for that fare and why I collect it; that is one receipt I use. Now, the receipt I use to give the passenger for his ticket, I take upon myself to use the same one given a passenger for his fare; the company does not issue these receipts for me to give passengers for the passengers to give to scalpers.

Q. Have you got any of those receipts?

A. No, sir; not with me. I would have brought one down
139 if I thought you wanted it. I have them in my satchel. They are issued by the company for the independent purpose of stating why you collect excess over the regular rate from a passenger, or when a party gets on the train and states to you, I have lost my ticket, I will pay my fare, give me a receipt for the money.

Q. Don't you make, under directions of your superior officer, a carbon copy of the receipt you issue?

A. My superior officer has nothing to do with it. Only I turn the ticket in to him and give him an explanation of where I got it and why I lifted it.

Q. Don't those receipts you carry have a stub which shows substantially the statements contained in the receipt itself?

A. No, sir. It is just a plain little piece of paper.

Q. You write it all, or is any part of it printed?
A. It is not a printed form.
Q. Just answer the question; is any part of it printed?
A. It is a written form.
Q. There is no part of it printed?
A. Part of the receipt is printed Louisville and Nashville Railroad. Yes, sir; it is on Louisville and Nashville paper. I will tell you the purpose of it. It is for cash collections, and when I use it for any other purpose, the responsibility is on me.
Q. How does the company know what fares you collect for which you issue these receipts unless you keep a record of them?
A. There are two different fares you collect; one is a three cent a mile fare and the other a four cent a mile fare. As I told you just now, the receipts are for cash collections. If Judge Larazus gets on No. 2 to-night and pays me $5.65 to Mobile and he does not ask for any receipt for his money, it is not necessary for me to use it; but if the Judge says, You have charged me four cents a mile, give me a receipt, I just give him one of these receipts. If he has lost his ticket and pays his fare, I give him a receipt, calling for the amount of his fare.
Q. What I want to know is, what check has the company on the collection of fares by the conductors on the train?
A. They have a cash fare slip, calling for the amount you collect.
Q. So, when you are issued those, you have either got to return the cash fare slip in to the company or the money that represents it?
A. When I issue those?
140 Q. I say, when the company entrusts you with those cash fare slips to a certain amount, you have either got to return them to the company or the money that represents them?
A. That cash fare that is collected on the train, that belongs to the Louisville and Nashville railroad.
Q. I say, when the company issues those cash fare slips, it charges the total amount of the slips against you?
A. Yes, sir.
Q. And you have either got to turn the cash fare slips in to the company or the money that represents them?
A. I turn the slips back.
Q. If you don't have them on hand——
A. We have them——
Q. If you use the cash fare slip, you have got to account for it in money?
A. You just make out your cash report from station to station—from New Orleans to Mobile, one fare; that is all there is to it. There is no explanation given about the fare. The company don't want any explanation about it. They just want the amount you collect. They don't ask for any information about why you collect it, or anything of that kind.
Q. When you collect from a man who has a scalped ticket and take up the ticket and make him pay, don't you make any statement to the company of that?
A. If the company asks for it I do.

Q. Unless they ask for it, you do not give it?

A. It is according to the rate I charge him.

Q. Is it discretionary with you to charge two different rates?

A. It is according to the clothes a man has on his back—what kind of a man he is. If it is Judge Lazarus, I would charge him $5.65; if it is my friend Mr. Farrar, I would charge him $4.25.

Q. When did this Kelsko, Bitterman and Mehlig business happen?

A. In this combination?

Q. Yes?

A. That has been going on for a long time—a good, long while.

Q. About how long ago?

A. What day I couldn't tell you. They have been in the business a good, long time. I have not heard of Mehlig so long as the others. I have heard of Kelsko and Barnett 16 or 18 years ago, to my knowledge. Barnett and Kelsko it was; I don't know about the rest of them.

141 Q. When were the statements made to which you testify? When were they made to you—how many years ago?

A. Statements of what?

Q. By these different passengers?

A. I can't tell you how many years; I didn't keep any memorandum. I only took them as they came. I never kept any positive memorandum of that at all.

Q. Did you report them to your superior officer?

A. I had instructions from my superior officer to lift all tickets that were sold by scalpers on the train.

Q. When you made your report, did you make it in writing to your superior officer?

A. I went to him to my superior officer, and told him the circumstances.

Q. Who was your superior officer?

A. Charles Marshall, Superintendent.

Q. He is Division Superintendent?

A. Yes, sir.

Q. Did he ask you to make it in writing?

A. I made one in writing to Mr. Ridgely.

Q. When—recently?

A. I can't remember now how long it has been. I guess he can tell you.

Q. I want your memory on it.

A. My memory is a little off on that thing. I can't get up to that. But Mr. Ridgely can tell you, I think. Mr. Ridgely, have you any of those tickets?

Mr. BLAIR: Just go on and testify yourself.

A. I couldn't answer that question. I think at this last Reunion and since then I have had occasion to do it.

Q. There is a good deal of travel from New Orleans over your road to the North?

A. Yes, sir.

Q. As a matter of fact—you may not know it as a matter of fact, but even as a matter of opinion, don't you think that there is a larger

travel over the Louisville and Nashville to New York and Washing-
ing than over any other road coming to New Orleans?

A. That the travel is larger over the Louisville and Nashville from those points?

A. [Q.] Yes?

A. Yes, sir; I believe it is.

142 Q. Did you ever take up tickets that were sold in the North?

A. Coming out of Mobile?

Q. Yes, coming out of Mobile?

A. Yes, sir.

Q. Many of them?

A. I have taken up—I don't know how many, but some.

Q. Has the proportion been as large as the tickets sold coming out of New Orleans going east?

A. Not quite as many tickets sold in that manner, round trip from New Orleans to New York.

Q. How did you take them up—did you go through the same process as you did——

A. Every time I get hold of a fellow, I adopt something new, some other system on him. I get something new up every time. I have to get something new up.

Q. Did any of them ever tell you from whom they bought their tickets in New York or Washington—the names of the scalpers?

A. No, sir; my business is here in New Orleans.

Q. You don't recall having been told who were the scalpers in the North who sold the tickets?

A. I don't know anything about the scalpers in the North. I only know them here.

Q. You live in New Orleans or Mobile?

A. I have been living here for 40 years.

Q. You know where Kelsko's office is—you pass it every day?

A. I don't know where it is.

Q. And Mehlig's and Bitterman's, St. Charles and Gravier?

A. I pass up and down there maybe once a year. I go on Carondelet Street. I take the Henry Clay Avenue car. I am a kind of a domestic man, you know, Judge Lazarus, and I get right into the cars and go straight home. I would be home now if I was not down here talking with you.

Q. But you do go on Saint Charles Street occasionally?

A. Once a year.

Q. And you have been living here in New Orleans for 40 years?

A. You know, Judge, I quit drinking when I got married, so you know, Judge, I haven't got any use for Saint Charles Street.

Q. You have never been told by any man whose ticket you took up because of your appreciation of the fraudulency of the

143 ticket from whom they bought their ticket in New York?

A. No, sir.

Q. Or in Washington?

A. No, sir.

Q. Or in Philadelphia?

A. No, sir.
Q. Or in Mobile?
A. No, sir.
Q. Or in Atlanta?
A. No, sir.
Q. Or in Montgomery?
A. No, sir; my business is here. I have no business with those people at all.
Q. Wasn't your business as much in Mobile as in New Orleans?
A. I didn't happen to reach men with round-trip tickets out of New Orleans.
Q. There are quite a number of what you railroad people call scalpers in business in Mobile, are there not?
A. If there are, I don't know it.
Q. Are they not around the Louisville and Nashville depot there?
A. I don't know.
Q. Don't you see signs there, tickets for sale to different points at low rates?
A. Well, all I see is the sign Louisville and Nashville. I don't see scalpers' signs; I wouldn't read one if I saw it.
Q. You don't deny there is a string of them right at the depot there?
A. I do deny it. There is no string of them at the depot.
Q. I say a string, I mean three or four places there?
A. They are not within five squares of the depot. I go up that street.
Q. Where are they?
A. I don't know. I answer that part because I go up the street the depot is on.
Q. They are not within five squares——
A. I go out Government street.
Q. And you never ask any of the passengers whose tickets you take up whether they got them in Mobile?
A. They are kind of honest people in Mobile, that travel along on their own tickets.
Q. Then the only dishonest people are in New Orleans?
144 A. I am not talking about scalpers. I mean the people that travel.

Return of Special Examiner.

Filed July 15, 1904.

UNITED STATES OF AMERICA:

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
MARCUS K. BITTERMAN ET AL.

I, Henry J. Carter, Special Examiner, duly appointed by the Circuit Court of the United States for the Eastern District of Louisiana to take the testimony in the above cause, do hereby certify that on the days named in the depositions herewith returned, to-wit: January 21, 1904, I was attended at the office of the Clerk of said Court in the City of New Orleans, by Joseph P. Blair, Esq., of counsel for the complainant, and H. L. Lazarus, Esq., and Girault Farrar, Esq., solicitors for Marcus K. Bitterman, Julius Mehlig and C. T. Kelsko, defendant-; and by John K. Ridgely and George E. Cranmer, the witnesses giving said depositions, who were duly sworn and examined and their depositions were reduced to writing, are the depositions hereto attached.

I do further certify that the complainant produced and had marked, during the taking of said testimony, the following Exhibits, to-wit:

(Railroad Ticket) marked R. 1.
(Railroad Ticket) marked R. 2.
Articles of Association, S. E. Pass. Assn., R. 3 (Produced on call of Defts.)

I herewith return into Court the testimony and exhibits attached thereto and referred to above.

Respectfully submitted,
(Signed) H. J. CARTER,
Special Examiner.

July 15, 1904.

145 *Sample of Reduced Rate Ticket.*

Issued by Louisville and Nashville Railroad Company. Offered by complainant in connection with testimony of J. K. Ridgely. Marked R. 1 and filed February 3, 1904.

Sample of Ticket.

Issued by the Louisville & Nashville Railroad Company. Marked "R. 2." Offered by complainant in connection with testimony of J. K. Ridgely and filed February 3, 1904.

Pamphlet.

Being Articles of Association of the Southeastern Passenger Association, dated October 22, 1902, and Rules of the Conference Committee, dated November 19, 1902, called for by solicitor of defendants in connection with testimony of J. K. Ridgely. Marked "R. 3" and filed February 3, 1904.

NOTE.—The above mentioned three offerings are to be transmitted in the originals to the U. S. Circuit Court of Appeals for the Fifth Circuit, along with the Transcript of Appeal, as per stipulation at page 201 hereof.

Final Decree.

Filed January 28th, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13166. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN, JULIUS MEHLIG, and CHARLES T. KELSKO.

This cause came on for final hearing upon the pleadings of the above named complainant and defendants, and upon the evidence offered and filed on behalf of the complainant, and was argued by counsel.

146 Upon consideration whereof, the Court, having heretofore overruled the pleas and demurrers of defendants, which ruling is now affirmed, being fully advised in the premises, does find that the equity in the case is for the complainant, the Louisville & Nashville Railroad Company, and against the defendants, the said Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, and that the said complainant is entitled to the relief which it prays against said defendants, so far as concerns the tickets covered by the two interlocutory injunctions hereinafter referred to, but not as to its future issues of such or similar tickets.

It is, therefore, ordered and decreed by the Court that the injunction heretofore issued on the 16th day of May, 1903, commanding and enjoining said above named defendants, and each of them, and their or his agents, servants, employees, assigns successor or successors, and all others acting for them, or any or either of them, and all persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the issuance of said injunction, that they and each of them absolutely refrain and desist from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupon or unused portion thereof, issued by complainant, the Louisville and Nashville Railroad Company, or by any other railroad company for use over

complainant's lines of railway, or any part of them, for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903, which, by the terms thereof, are non-transferable, or from soliciting, advising, encouraging or procuring any person other than the original purchasers of said tickets to use or attempt to use said tickets for passage on any train or trains of the complainant, be made perpetual, and that the injunction heretofore issued on the 8th day of February, 1904, against the said above named defendants, commanding and enjoining them and each of them, and their or his agents, servants, employees, assigns, successors and successor, and all others acting for them, or any or either of them, and all other persons whomsoever, though not named herein, from and after the time when they have severally had knowledge of the issuance of said injunction, from buying, selling, dealing or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued by complainant, or by other railroads for use over complainant's lines of
147 railway, or any part of them, for use on the occasion of the Mardi Gras festivals at New Orleans, in February, 1904, which, by the terms thereof, are non-transferable and purport to be signed by the original purchaser; and from soliciting, advising, encouraging, or procuring any person other than the original purchasers of said ticket or tickets to use or attempt to use such ticket or tickets for passage on any train or trains of complainants, be also made perpetual.

It is further ordered, adjudged and decreed, that as to so much of the relief sought by complainant as relates to non-transferable tickets to be hereafter issued, such relief is denied; without prejudice, however, to the right of complainant to seek such relief by independent proceedings on or before each occasion when it may issue such non-transferable tickets.

It is further ordered, adjudged and decreed that the said above named defendants pay complainant's costs, to be taxed herein.

New Orleans, La., January 28th, 1905.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Appeal of Complainant Made in Open Court and Order Thereon.

Filed February 8, 1905.

United States Circuit Court for the Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

No. 13166. In Equity.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN, JULIUS MEHLIG, and CHARLES T. KELSKO.

The above named complainant, the Louisville and Nashville Railroad Company, conceiving itself aggrieved by the final decree

entered on the 28th day of January, 1905, in the above entitled cause, wherein it was ordered, adjudged and decreed that, while complainant was entitled to have certain interlocutory injunctions therein set forth made perpetual, it was not entitled to the relief prayed for as to non-transferable tickets to be hereafter issued, except it should seek the same by independent proceedings on or before each occasion when it might issue such non-transferable tickets, does hereby appeal from said final decree to the
148 United States Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors filed herewith; and it prays that this appeal may be allowed; that a transcript of the record, papers and proceedings upon which said final decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Fifth Circuit.

Order.

Let an appeal be granted to the complainant as prayed for to the United States Circuit Court of Appeals for the Fifth Circuit, returnable in thirty days from the date hereof, upon complainant giving bond in the sum of five hundred dollars, conditioned as the law directs.

New Orleans, La., February 8th, 1905, in open Court.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Assignment of Errors.

Filed February 8, 1905.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana.

No. 13166. In Equity.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,
vs.
MARCUS K. BITTERMAN, JULIUS MEHLIG, and CHARLES T. KELSKO, Defendants.

Assignment of Errors.

Now comes the Louisville and Nashville Railroad Company, through its undersigned solicitors, and assigns errors in the decree of the Circuit Court in this cause as follows:

1. The Court erred in refusing to grant to complainant the full injunctive relief prayed for in its bill of complaint, viz., an injunction restraining defendants and each of them, his or their agents, servants, employees, assigns, successor or successors, and all others

acting for defendants, or any or either of them, and all persons whomsoever, although not named therein, from and after
149 the time when they severally have knowledge of the existence of such injunction, from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued by complainant, or by any other railroad company for use over complainant's lines of railways, or any part of them, which, by the terms thereof, are non-transferable, or from soliciting, advising, encouraging or procuring any person other than the original purchasers of such tickets to use or attempt to use said tickets for passage on any train or trains of complainant.

2. After finding, as it did, that complainant has a right to issue such non-transferable tickets, and that the action of defendants in "scalping" the same was a wrongful and illegal violation of complainant's right, causing it irreparable injury, and entitling it to injunctive relief from a Court of Equity, the Court erred in confining the final injunction to two classes of such tickets and in refusing to give it such preventive relief by injunction as would be co-extensive with the right to be protected and the wrong and injury threatened.

3. That the Court erred in holding that, in order to protect its right to issue said non-transferable tickets from being violated by defendants through the purchase and sale of the same, in violation of the terms of the contract embodied in said tickets, complainant must institute a separate suit for injunction on or before every occasion of the exercise of said right.

4. That Court erred in failing and refusing to include in the injunctive relief which it granted by said final decree the case of "Winter Tourist Tickets," which, the evidence showed, were being issued by complainant and were being wrongfully dealt in or "scalped" by defendants, during the pendency of the suit and at the time of the final decree herein.

Wherefore, complainant prays that the final decree of the said Circuit Court of the United States for the Eastern District of Louisiana be amended so as to grant to complainant a final injunction as prayed for in its said bill of complaint.

All of which is respectfully submitted.

(Signed) DENEGRE & BLAIR,
Solicitors for Complainant, the Louisville & Nashville Railroad Company.

150 *Bond of Appeal.*

Filed February 8, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN, JULIUS MEHLIG and CHARLES T. KELSKO.

Know all men by these presents, that we, the Louisville and Nashville Railroad Company as principal and R. M. Walmsley as surety, are held and firmly bound unto Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko in the full and just sum of five hundred dollars, to be paid to the said Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of February, in the year of our Lord one thousand, nine hundred and five.

Whereas, lately, at a session of the United States Circuit Court, Fifth Judicial Circuit, holding sessions in and for the Eastern District of Louisiana, at New Orleans, Louisiana, in a suit depending in said Court, between the Louisville and Nashville Railroad Company, complainant, and the said Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, defendants, being suit No. 13166 of the docket of said Court, a final decree was rendered against the said above named defendants, giving to defendant a part of the relief prayed for and denying to it a part of the relief prayed for, and the said complainant having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court, to amend the said decree and to obtain the full relief prayed for, and a citation directed to the said Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko being about to be issued, citing and admonishing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Louisville and Nashville Railroad Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to
151 make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) LOUISVILLE & NASHVILLE R. R. COMPANY,
By GEO. DENEGRE,
District Attorney and Attorney in Fact.

(Signed) R. M. WALMSLEY.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Personally appeared R. M. Walmsley, who, being duly sworn, deposes and says that he is surety on the within bond; that he resides in the City of New Orleans, State of Louisiana, in the Fifth Circuit and Eastern District of Louisiana, and is worth the full sum of five hundred dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) R. M. WALMSLEY.

Subscribed and sworn to before me this 8th day of February, 1905.

(Signed) FELIX J. PUIG,
[SEAL.] *Notary Public.*

Bond approved. February 8th, 1905.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Stipulation as to Certain Exhibits.

Filed February 14, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13166. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN & AL.

It is hereby stipulated and agreed by the undersigned counsel that the following exhibits, filed and offered in the above cause, need not be copied into the Transcript of Appeal thereof, but may be transmitted in the originals, along with said Transcript, to the United States Circuit Court of Appeals for the Fifth Circuit; said Exhibits being as follows, to-wit:

152 Sample of Reduced Rate Ticket issued by Louisville & Nashville Railroad Company, account U. C. V. Reunion, 1903, marked "Exhibit A" and filed with bill of complaint in above case, May 9, 1903.

Sample of Reduced Rate Ticket issued by Louisville & Nashville Railroad Company, account Mardi Gras, 1904; attached to affidavit of J. K. Ridgely, marked "Ridgely A" and filed February 3, 1904.

Sample of Ticket issued by Louisville & Nashville Railroad Company, marked "R. 2," offered in connection with testimony of J. K. Ridgely for complainant and filed February 3, 1904.

A Pamphlet, being Articles of Association of the Southeastern Passenger Association, dated October 22, 1902, and Rules of the Conference Committee, dated November 19, 1902, called for by the

solicitor for defendants in connection with testimony of J. K. Ridgely, marked "R. 3" and filed February 3, 1904.

Sample of Reduced Rate Ticket issued by Louisville and Nashville Railroad Company, offered in connection with testimony of J. K. Ridgely, marked "R. 1," and filed February 3, 1904.

(Signed) HENRY L. LAZARUS,
Solicitor for Def'ts.

(Signed) DENEGRE & BLAIR,
Solicitors for Complainant.

153 *Motion for Cross Appeal, Made in Open Court, and Assignments of Errors.*

Filed February 18, 1905.

U. S. Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. —.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
versus
MARCUS K. BITTERMAN ET ALS.

On motion of Henry L. Lazarus, of counsel for Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, defendants in the above numbered and entitled cause, and on suggesting to the Court that they believe there is error to their prejudice in the decree pronounced in this cause on the 28th day of January, 1905, and signed and enrolled on the 28 day of January, 1905, and that by said judgment, and to the extent that said judgment maintains and makes perpetual the injunctions issued on the 16 day of May, 1903, and on the 8 day of February, 1904, they are aggrieved, and that they desire to appeal therefrom; and on further suggesting to the Court that complainant in the above numbered and entitled cause has applied for and obtained an order of appeal from the decree rendered in this cause, insofar as it denies the full measure of relief sought by plaintiffs; and on further suggesting that defendants herein desire now to cross appeal from the decree rendered perpetuating the injunctions hereinbefore referred to, and this appeal should be made returnable to the Honorable the Circuit Court of the United States for the Fifth Circuit, upon such day as the law fixes, and upon such bond as the Court may determine, conditioned as the law directs; and on suggesting the accompanying assignments of error;

It is ordered that the defendants, Bitterman, Mehlig and Kelsko, be, and they are hereby allowed and granted an appeal, without supercedeas, from the decree of this Court, entered on the 28 day of January, 1905; the said appeal being limited to the decree perpetuating the injunctions referred to in the body of this motion; and that the said appeal be and it is hereby made returnable to the Hon-

orable the Circuit Court of the United States for the Fifth Circuit,
within thirty days from the date hereof, and that defendants
154 and cross appellants be ordered to give bond in the sum of two
hundred dollars, conditioned as the law directs.

New Orleans, La., February 18, 1905.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Assignments of Errors.

U. S. Circuit Court for the Eastern District of Louisiana.

No. —.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET ALS.

1st. The Court erred in assuming, asserting and maintaining in this cause, jurisdiction, inasmuch as the amount involved was less than the lowest limit of this Court's jurisdiction; and the averments of the bill were fictitious, fraudulent and colorable, and made for the purpose solely of seizing the jurisdiction of this Court.

2nd. That for the cause of complaint, if any exists, as recited in the bill, the complainant has a complete and adequate remedy at law, and cannot, upon recitals of fact traversed by the answer, invoke the equity jurisdiction of the United States Circuit Courts.

3rd. That it is not competent, nor within the power and authority of a Chancellor or of the Circuit Court of the United States, to establish a rule of civil conduct, and by its judgment and decree control in advance those who are charged with being about to breach it, and subjecting them to punishment by contempt process, thereby exercising legislative authority and usurping the functions of a co-ordinate department of the government.

4th. That the right to deal and traffic in railroad tickets as brokers is an inalienable right, that being, under the declared policy of the State of Louisiana, a legitimate business, and that any attempt upon the part of the United States Courts by writ of injunction to deny
them the right to conduct the business of ticket brokers is in
155 violation of the Fifth Amendment of the Constitution, which
guarantees to every citizen protection in the enjoyment of his life, liberty and property, and of which he cannot be deprived without due process of law.

5th. That under the bill and answer, in the absence of proof, the case should have been determined as upon the bill and answer, defendants' answer meeting and traversing all the equities of the bill.

6th. That the Court erred in perpetuating the instructions issued at the times recited in the motion, after its jurisdiction had been by plea and answer challenged, and there was no proof of injury to the complainant.

7th. That the Court refused on final hearing to pass upon the plea to its jurisdiction, and the record fails to show from the evidence administered that any injury whatever was suffered by the complainant by any acts complained of as against these defendants.

(Signed) HENRY L. LAZARUS,
Solicitor for Cross Appellants.

Bond for Cross Appeal.

Filed Feb. 21, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN, JULIUS MEHLIG and CHARLES T. KELSKO.

Know all men by these presents, that we, Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, as principals, and Herman Michel as sureties, are held and firmly bound unto the Louisville and Nashville Railroad Company in the full and just sum of two hundred dollars, to be paid to the said Louisville and Nashville Railroad Company, its certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by
156 these presents. Sealed with our seals and dated this — day of February, in the year of our Lord one thousand, nine hundred and five.

Whereas, lately, at a session of the United States Circuit Court, Fifth Judicial Circuit, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between the said Louisville and Nashville Railroad Company, complainant, and the said Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, defendants, being suit No. 13,166 of the docket of said Court, a final decree was rendered against the said Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, defendants, and the said Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, having obtained a cross appeal, and filed a copy thereof in the Clerk's office of the said Court to reverse the final decree in the aforesaid suit, and a citation directed to the said Louisville and Nashville Railroad Company, citing and admonishing it to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such that if the said Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko shall prosecute their cross appeal to effect, and answer all damages and

costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] (Signed) MARCUS K. BITTERMAN.
[SEAL.] " JULIUS MEHLIG.
[SEAL.] " CHAS. T. KELSKO.
" H. MICHEL.

Sealed and delivered in presence of:
——— ———.
——— ———.
——— ———.

Approved by:
(Signed) CHARLES PARLANGE,
U. S. Judge.

UNITED STATES OF AMERICA,
Eastern District of Louisiana, ss:

Personally appeared Herman Michel, who being duly sworn, deposes and says that he is the surety on the within bond, that
157 he resides in the City of New Orleans, Eastern District of Louisiana, and is worth the full sum of two hundred dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) H. MICHEL.

Subscribed and sworn before me this 21 day of February, 1905.
(Signed) H. J. CARTER,
[SEAL.] *U. S. Commissioner, Eastern District of Louisiana.*

Stipulation.

Filed February 28, 1905.

U. S. Circuit Court, Eastern District of Louisiana.

No. 13166.

LOUISVILLE & NASHVILLE R. R. CO.
vs.
MARCUS K. BITTERMAN ET ALS.

It is hereby stipulated and agreed by the undersigned counsel that the following exhibits, filed and offered in the above cause, need not be copied into the Transcript of Appeal thereof, but may be transmitted in the originals, along with said Transcript, to the United States Circuit Court of Appeal for the Fifth Circuit, said exhibits being as follows, to-wit:

Ticket issued by Louisville & Nashville R. R. Company account U. C. V. Reunion, 1903, signed "Geo. H. Gray" (Original Purchaser); filed May 20, 1903.

Card of American Cut Rate Ticket Office, "D. Pike, Manager." (Indorsed:) No. 13166. U. S. C. Court. Filed May 21, 1903. H. J. Carter, Clerk. Written on back of card: "Fred Young" (in ink); "J. T. Smith" (in pencil).

Reduced Rate Ticket, issued by Macon & Birmingham Railway Co., account U. C. V. Reunion, 1903; signed "S. H. Fuller" (Original Purchaser), and filed with rule of complainant for contempt on Julius Mehlig, May 23, 1903.

Card of Mehlig's Cut-Rate Ticket Office, offered by complainant on rule against Mehlig, and filed May 23, 1903.

158 Reduced Rate Ticket, is-ued by Seaboard Air Line Railway, account U. C. V. Reunion, 1903, signed "J. H. Mellette" (Original Purchaser); filed with rule of complainant against H. J. Wallace for contempt, May 23, 1903.

Reduced Rate Ticket, issued by the Louisville & Nashville Railroad Company, account U. C. V. Reunion, 1903; signed "R. C. McMann" (Original Purchaser), and filed with rule of complainant against G. F. Young for contempt, May 23, 1903.

(Signed) HENRY L. LAZARUS,
For Def'ts & Cross Appellant.
" DENEGRE & BLAIR,
Sol'rs for Compl't.

159 [*Clerk's Certificate.*]

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Henry J. Carter, Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, do hereby certify that the foregoing 210 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced and on file in said record, on the trial of the case of The Louisville and Nashville Railroad Company *versus* Marcus K. Bitterman *et al.*, No. 13166 of the docket of the said Court, except the following, to-wit:

Sample of Reduced Rate Ticket, issued by Louisville & Nashville Railroad Company, account U. C. V. Reunion, 1903, marked "Exhibit A" and filed with bill of complaint in above case May 9, 1903.

Sample of Reduced Rate Ticket, issued by Louisville & Nashville Railroad Company, account Mardi Gras, 1904; attached to affidavit of J. K. Ridgely, marked "Ridgely A," and filed February 3, 1904.

Sample of Ticket issued by Louisville & Nashville Railroad Company, marked "R. 2," offered in connection with testimony of J. K. Ridgely for complainant, and filed February 3, 1904.

Pamphlet, being Articles of Association of the Southeastern Passenger Association, dated October 22, 1902, and Rules of the Confer-

ence Committee, dated November 19, 1902; called for by the solicitor for defendants in connection with testimony of J. K. Ridgely, marked "R. 3," and filed February 3, 1904.

Sample of Reduced Rate Ticket, issued by Louisville and Nashville Railroad Company; offered in connection with testimony of J. K. Ridgely; marked "R. 1" and filed February 3, 1904.

160 Ticket issued by Louisville & Nashville R. R. Company, account U. C. V. Reunion, 1903; signed "Geo. H Gray" (Original Purchaser); filed May 20, 1903.

Card of American Cut Rate Ticket Office, "D. Pike, Manager." Indorsed: No. 13166, U. S. C. Court. Filed May 21, 1903. H. J. Carter, Clerk. Written on back of card: "Fred Young (in ink); "J. T. Smith" (in pencil).

Reduced Rate Ticket, issued by Macon & Birmingham Railway Co., account U. C. V. Reunion; signed "S. H. Fuller" (Original Purchaser), and filed with rule of complainant for contempt on Julius Mehlig, May 23, 1903.

Card of Mehlig's Cut Rate Ticket Office, offered by complainant on rule against Mehlig and filed May 23, 1903.

Reduced Rate Ticket, issued by Seaboard Air Line Railway account U. C. V. Reunion, 1903; signed "J. H. Mellette" (Original Purchaser); filed with rule of complainant against H. J. Wallace for contempt, May 23, 1903.

Reduced Rate Ticket, issued by the Louisville & Nashville Railroad Company, account U. C. V. Reunion, 1903; signed "R. C. McMann" (Original Purchaser), and filed with rule of complainant against G. F. Young for contempt, May 23, 1903.

Which said foregoing mentioned exhibits are transmitted in the originals with this transcript, in the envelope attached marked "Original Exhibits in Case No. 13166, Louisville and Nashville R. R. Co. *vs.* Marcus K. Bitterman *et als.*," to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, as per stipulations of counsel, copied at pages 201 and 209 respectively of this transcript.

Witness my hand and the seal of said Court, at the City of New Orleans, Louisiana, this 3rd day of March, A. D. 1905.

[SEAL.] H. J. CARTER, *Clerk.*

161 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing printed record of 160 pages, in the case of Louisville & Nashville Railroad Company, appellant and cross-appellee, against Marcus K. Bitterman, *et al.*, appellees and cross-appellants, numbered 1444, was printed under my supervision, and is identical with the printed records upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City

of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of April, A. D. 1906.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

162 Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the Third Monday in November, A. D. 1905, at New Orleans, Louisiana, before the Honorable Don A. Pardee, the Honorable A. P. McCormick and the Honorable David D. Shelby, Circuit Judges.

Be it remembered that heretofore, to-wit, on the 8th day of March, A. D. 1905, a transcript of record, pursuant to an appeal and cross-appeal from the Circuit Court of the United States for the Eastern District of Louisiana was filed in the office of the clerk of the United States Circuit Court of Appeals for the Fifth Circuit, wherein the Louisville & Nashville Railroad Company was appellant and cross-appellee and Marcus K. Bitterman *et al.*, were appellees and cross-appellants, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 1444.

That thereafter the following proceedings were had in said cause in said Circuit Court of Appeals, viz:

Argument and Submission.

No. 1444.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
MARCUS K. BITTERMAN ET AL.

and

MARCUS K. BITTERMAN ET AL.
vs.
LOUISVILLE & NASHVILLE RAILROAD CO.

FEBRUARY 17TH, 1906.

On this day this cause was regularly called, and after argument by J. P. Blair, Esq., for appellant, and Henry L. Lazarus, Esq., for appellees, was submitted to the Court.

And thereafter, on March 27th, 1906, an opinion of said Circuit Court of Appeals was filed in said cause in words and figures following, to-wit:

163 *Opinion.*

Filed 27 day of March, 1906.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1444.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,
vs.
MARCUS K. BITTERMAN ET AL., Appellees.

Appeal and Cross-Appeal from the Circuit Court of the United States, Eastern District of Louisiana.

Before Pardee, McCormick, and Shelby, Circuit Judges.

Statement of the Case.

The complainant railroad company is a citizen of the State of Kentucky, engaged in the business of operating lines of railroad upon which are transported passengers between New Orleans and points in this and other States reached by complainant and its connections. The parties defendant to the bill of complaint are a number of individuals, citizens of Louisiana, engaged in the business of what is commonly called "ticket scalping." Three of the defendants, Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, joined in filing responsive pleadings and contesting complainant's right to the relief sought, which was to enjoin defendants, and each of them, and his or their agents, etc., "from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets or the returned coupons or unused portions thereof, issued by orator or by any other railroad company for use over orator's lines of railway, or any part of them, which, by the terms thereof, are non-transferable, or from soliciting, advising, encouraging or procuring any persons other than the original purchasers of such tickets to use, or attempt to use, said tickets for passage on any train or trains of orator, especially, including the non-transferable round trip tickets issued for use on the occasion of the United Confederate Veterans' Reunion at New Orleans in May, 1903."

The Court *a quo* held that complainant had a legal right to issue reduced rate non-transferable tickets; that defendants, by "scalping" such tickets, were committing wrongful acts, violative of com-
plainant's rights, and causing it irreparable injury; that
164 remedy by law was inadequate, and that injunctive relief was the proper remedy; yet, when it came to the final decree, it refused to give preventive relief by enjoining defendants generally from "scalping" the reduced rate non-transferable tickets which

complainant was in the business of issuing, and which defendants were admittedly in the business of buying and selling. It confines the relief accorded complainant in the final decree to making perpetual the preliminary injunctions it had rendered during the pendence of the suit, one forbidding the "scalping" of the tickets about to be issued, on the occasion of the Confederate Veterans' Reunion in May, 1903, and the other forbidding similar wrongful acts in respect to the tickets about to be issued on the occasion of the Mardi Gras festivals of 1904. So much of the relief sought by complainant as related to future issues of non-transferable tickets was denied, without prejudice to its rights to seek such relief by independent proceedings on or before each occasion when it might issue such tickets.

In order to secure a reversal of the ruling, that complainant must bring a separate suit for every particular kind of non-transferable ticket it proposes to issue, and a separate suit on every occasion when it proposes to issue any such tickets, the complainant sued out this appeal, assigning the following errors:

1. "The Court erred in refusing to grant to complainant the full injunctive relief prayed for in its bill of complaint, viz., an injunction restraining defendants and each of them, his or their agents, servants, employés, assigns, successor or successors, and all others acting for defendants, or any or either of them, and all persons whomsoever, although not named therein, from and after the time when they severally have knowledge of the existence of such injunction, from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portion thereof, issued by complainant, or by any other railroad company for use over complainant's lines of railways, or any part of them, which, by the terms thereof, are non-transferable, or from soliciting, advising, encouraging or procuring any persons other than the original purchasers of such tickets, to use or attempt to use said tickets for passage on any train or trains of complainant.

2. "After finding, as it did, that complainant had a right to issue such non-transferable tickets, and that the action of
165 defendants in 'scalping' the same was a wrongful and illegal violation of complainant's right, causing it irreparable injury and entitling it to injunctive relief from a Court of Equity, the Court erred in confining the final injunction to two classes of such tickets, and in refusing to give it such preventive relief by injunction as would be co-extensive with the right to be protected and the wrong and injury threatened.

3. "That the Court erred in holding that, in order to protect its right to issue said non-transferable tickets from being violated by defendants through the purchase and sale of the same in violation of the terms of the contract embodied in said tickets, complainant must institute a separate suit for injunction on or before every occasion of the exercise of said right.

4. "The Court erred in failing and refusing to include in the injunctive relief which it granted by said final decree the case of

'Winter Tourist Tickets,' which the evidence showed were being issued by complainant and were being wrongfully dealt in or 'scalped' by defendants during the pendency of the suit and at the time of the final decree herein."

The defendants have sued out a cross-appeal and assign the following errors:

1st. "The Court erred in assuming, asserting and maintaining in this cause jurisdiction, inasmuch as the amount involved was less than the lowest limit of this Court's jurisdiction; and that the averments of the bill were fictitious, fraudulent and colorable, and made for the purpose solely of seizing the jurisdiction of this Court.

2nd. "That for the cause of complaint, if any exists, as recited in the bill, the complainant has a complete and adequate remedy at law, and cannot, upon recitals of fact traversed by the answer invoke the equity jurisdiction of the United States Circuit Courts.

3rd. "That it is not competent, nor within the power and authority of a chancellor, or of the Circuit Court of the United States, to establish a rule of civil conduct, and by its judgment and decree, control in advance, those who are charged with being about
166 to breach it, and subjecting them to punishment by contempt process, thereby exercising legislative authority and usurping the functions of a co-ordinate department of the government.

4th. "That the right to deal and traffic in railroad tickets, as brokers, is an inalienable right, that being, under the declared policy of the State of Louisiana, a legitimate business, and that any attempt upon the part of the United States Courts by writ of injunction to deny them the right to conduct the business of ticket brokers is in violation of the Fifth Amendment of the Constitution, which guarantees to every citizen protection in the enjoyment of his life, liberty and property, and of which he cannot be deprived without due process of law.

5th. "That under the bill and answer, in the absence of proof, the case should have been determined as upon the bill and answer, defendants' answer meeting and traversing all the equities of the bill.

6th. "That the Court erred in perpetuating the injunctions issued at the times recited in the motion, after its jurisdiction had been by plea and answer challenged, and there was no proof of injury to the complainant.

7th. "That the Court refused on final hearing to pass upon the plea to its jurisdiction, and the record fails to show from the evidence administered that any injury whatever was suffered by the complainant by any acts complained of as against these defendants."

Article 1 of the bill of complaint sets forth the organization of complainant under the laws of Kentucky, and its citizens of that State; its ownership and operation of an extensive system of railways traversing nine States; its connection with other railroads, whereby it reaches all points in the United States, Canada and

Mexico, and transports large numbers of passengers to all parts of the United States, as well as to foreign countries.

Article II states that defendants are citizens of the State of Louisiana, and inhabitants of the Eastern District thereof, and are each what is known as a ticket broker, or "scalper," and engaged in the business of buying and selling the unused portions of railroad passenger tickets, especially excursion or special rate tickets issued on occasions of fairs, expositions, conventions and the
167 like; and that defendants have been joined in this suit because their business and transactions complained of are in act, purpose and effect identical, and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them.

Articles III, IV, V, VI, VII and VIII relate especially to the United Confederate Veterans' Reunion then about to be held in the City of New Orleans. The bill showed the nature of such annual reunions, the immense attendance thereat, the extensive preparations and arrangements being made therefor, the necessity for special reduced rates of fare to secure a large attendance, complainant's consent, at the request of a local committee of arrangement, to make special rates and to issue special excursion tickets to those desiring to attend the reunion, amounting to less charge for the trip to New Orleans and return than the regular lawful and reasonable charge one way to New Orleans, the result being that all desiring to attend the reunion and agreeing to observe the conditions attached to the tickets would be carried to New Orleans and return at a cost equivalent to one cent per mile, while the regular rate, except at a few competitive points, was three cents a mile. It was further shown (Art. IV) that the form of tickets to be used on the occasion in question was a non-transferable, reduced rate ticket, "issued account U. C. V. Reunion, 1903," good subject to the conditions printed thereon, for one first-class passage to New Orleans and return, the going trip to begin on date of sale, and the return trip to begin leaving New Orleans not later than May 24, 1903, and extension of the final leaving date being provided for on application of the original purchaser; that among the conditions on the face of the ticket, which ticket contract was signed by the original purchaser and the company, was one that the ticket was non-transferable, and if presented by any other than the original purchaser, who was required to sign the same at date of purchase, it would not be honored, but would be forfeited, and any agent or conductor of any of the lines over which it read should have the right to take up and cancel the entire ticket, both going and return portions. A copy of the form tickets was annexed and made part of the bill.

It is further stated that the attendance upon the reunion would be very large, exceeding 100,000 people, of which fully one-fourth would travel over complainant's lines of railway and make use of the round trip non-transferable U. C. V. Reunion tickets; that the large number of people to be carried by complainant on this special occasion had rendered it necessary to issue a ticket, the return portion of which

would not have to be signed by the original purchasers, as it
168 would be impracticable to secure such signatures in time to enable the owners thereof to depart when desired, and the same would be a great inconvenience and source of annoyance and expense to the people, for whose benefit such tickets were to be issued; that also, by reason of the large number of persons to be carried on this special occasion, it was wholly impracticable to have the return portions of the tickets presented to any agent of complainant in New Orleans, where the identification of the original purchaser could be properly made, and that it was equally impracticable for the train conductor or collector, while in the management of his train, and in charge of so many passengers thereon, to identify properly persons presenting return portions of such tickets, and at the same time give proper care and attention to the safety and welfare of such passengers and the operation of the train.

It was further alleged that complainant consented to the reduction of rates and provided for the issuance of the said non-transferable tickets in reliance upon being protected from the fraudulent dealings in such tickets by defendants after the issuance thereof, as thereafter set forth, and unless it was so protected it could not afford to make the very low rates it had consented to make, and "it cannot afford in the future, on similar occasions of conventions or other assemblies or celebrations in this city, to make reduced rates, on account of the irreparable injury, for which it had no adequate remedy at law, which will be inflicted on it by reason of said fraudulent dealings of defendants."

Article IX of the Bill is as follows:

"That defendants, and each of them, are engaged in the business of buying and selling the unused portions of railroad tickets, being commonly called ticket brokers or 'scalpers;' that they are accustomed to buy and sell the return coupons of non-transferable tickets, especially those sold at reduced rates for special occasions, for the express purpose, and no other, of putting them in the hands of purchasers, who will use the same to secure passage on orator's or other railroads by falsely impersonating the original purchaser, falsely and wrongfully signing his name, when such signature is required, falsely stating that he is the original purchaser, and thus by fraud and imposition deceive, impose upon and defraud orator and other railroad companies to their continuous loss, detriment and damage; that orator has frequently in the past, as, for example, on the occa-
169 sion of the Mardi Gras festivals in this city, issued reduced rate non-transferable round trip tickets, and the said ticket scalpers have always fraudulently dealt in the return coupons thereof, as above set forth, to the great and irreparable injury of orator's business."

Article X declares that complainant is informed and believes, and also knows, from past experience, and so avers, that defendants, and each of them, will, unless restrained by the Court, buy and sell the return portions of the U. C. V. Reunion tickets, and indulge in the same fraudulent practices as charged against them in the preceding

article in respect to similar classes of tickets, thus defrauding complainant out of thousands of dollars.

Article XI shows:

"That, by reason of the impossibility of preventing or detecting said frauds, as herein set forth, orator will be subjected to constant and frequently repeated losses and irreparable injury (far exceeding the sum of five thousand dollars, exclusive of interest and costs), and such of the public as shall innocently purchase said tickets to pecuniary losses, as well as to great annoyance and humiliation."

Article XII declares that the additional burden cast upon complainant's conductors and collectors of distinguishing the rightful owners of the return portions of such non-transferable tickets from the pretended or fraudulent holders thereof will inevitably subject complainant to the danger of multiplicity of suits for damages, where unavoidable errors are made by such conductors and collectors, and will unavoidably subject the public and complainant to great interruption, delay and much expense in the operation of its trains; that complainant has no means of discovering who the persons are who will so defraud it, by the purchase and use of such tickets, and who would otherwise be compelled to pay the lawful and reasonable one-way rates, which are much higher than the special reduced rates.

Article XIII declares that complainant has no adequate remedy at law against defendants, because of the impossibility of securing evidence, establishing the facts as to said frauds, and, if such evidence could be obtained, it would necessitate a multiciplicity of suits; because the injury to its business cannot be estimated or compensated in dollars and cents; and, because defendants, and each of them, are financially irresponsible, and no judgment obtained
170 against them at law could be collected on execution; that consequently complainant has no adequate remedy at all against defendants or any of them for the frauds which they are about to perpetuate, unless they are restrained by the orders of the Court.

Article XIV is as follows:

"Orator further shows that at all times it is its custom and usage, and that of its connecting lines, to issue tickets at reduced rates on various occasions to the traveling public, which, by the terms thereof, are not transferable, and constitute a special contract in express terms between orator and the lines issuing the same, all other lines over which the same entitle the holder to travel, and the original purchaser thereof, whereby the said original purchaser agrees that said ticket shall not be transferred by him to any other person."

Article XV reads as follows:

"That the defendants, and each of them, are, and have been for some time, engaged in the business of buying and selling, and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and transfer the same to defendants, or some of them, with the intent and purpose that such tickets shall be used, in violation of the terms thereof, by persons other than the original purchaser, with the full knowledge on the part of the defendants, and each of them, that the same is a fraud upon orator."

Article XVI reads as follows:

"That unless orator has the injunction relief herein prayed for, it cannot continue to make special reduced rates, as heretofore, on the occasion of the conventions, Mardi Gras festivals, and other like occasions, frequently occur-ing, when it is to the great material interest of this city that large numbers of visitors should attend, which attendance cannot be secured except by the issuance of special non-transferable round trip tickets as aforesaid."

Article XVII refers to the existence of ticket brokers' associations for the purpose of assisting each other in disposing of non-transferable tickets.

Article XVIII alleges that the nature of the business of all ticket brokers, or "scalpers," and the methods of conducting the
171 same are alike, all making use of the fraudulent devices and misrepresentations, charged in the bill, to dispose of non-transferable tickets, which form a large part of their stock in trade, that they are practically in a combination, or conspiracy, to defraud railroad companies, by inducing, persuading or misleading the traveling public to sell or buy such non-transferable ticket contracts. That injunctive relief similar to that sought in the bill had been accorded railroad companies by Courts sitting in other States of this country, and the ticket brokers have sought to evade the injunction by ostensibly assigning their business to some other ticket broker not named in ' order; that, moreover, numbers of scalpers from other places em ate to the city where an injunction has been granted and seek to engage in the same business and thus to render valueless the process and orders of the Court; that in order to afford complete and effective relief, the restraining and injunctive orders should be broad enough to include all who knowingly do what the order of the Court prohibits defendants from doing or who aid and abet defendants in violating the injunction or in defeating the object and purpose thereof.

Article XIX states:

"That the amount involved in this controversy exceeds, exclusive of interest and costs, the sum of five thousand dollars; that the value of the business which orator seeks to protect and the right which it seeks to have recognized and enforced far exceeds, in the case of each defendant, the sum of five thousand dollars, exclusive of interest and costs."

Article XX declares that complainant is without adequate or substantial relief in the premises, except by the interposition of a Court of Equity enjoining and restraining, by its writ of injunction, defendants and each of them, and all other persons, "from doing any of the acts hereinbefore complained of."

Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko filed a voluminous joint and several answer to the bill. Their defense is that the Court is without jurisdiction, and that defendants have a right to traffic in reduced rate non-transferable tickets, to buy the same from the original purchasers, and to sell the same to third persons to be used by them for passage on complainant's trains.

The answer admits the organization, citizenship, business
172 connections, etc., of complainant, as set forth in article I of the bill.

The averments of the bill in respect to the United Confederate Veterans' Reunion, the large attendance expected, the reduced rate non-transferable tickets provided for the occasion, etc., are admitted. Paragraph VI of the answer admits "that the form of the ticket usually provided by complainant and its connections whenever it makes so-called reduced rates as excursion rates is substantially the form set out and described in paragraph VI of the bill of complaint; that said form of ticket purports to contain certain conditions, and purports by the terms thereof to be signed by the original purchaser that said form of ticket purports and pretends to be non-transferable and to be conditioned that if presented by other than the original purchaser, who is supposed to sign the same at the date purchased, it will not be honored, but will be forfeited, and said proposed ticket further pretends to be conditioned that any agent or conductor on any of the lines over which it reads shall have the right to take it up and cancel the entire ticket, both the going and return portions of it; and that the form of ticket annexed to the bill of complaint as exhibit A is the proposed form of ticket to be issued by the complainant and its connections for persons along their lines desiring to attend said reunion of the United Confederate Veterans. It is charged, however, that the ticket conditions are impracticable, never enforced, unenforceable, unlawful and without consideration, and that the tickets are issued and bought with that understanding; that it ought to make no difference to complainant whether the original purchaser or some third person makes use of the return portions of such tickets.

Paragraph IX of the answer contains the following admissions: It is admitted that defendants are engaged in the business of buying and selling the unused portions of railroad tickets, or what is commonly known as "ticket brokerage," and that, in accordance with the general custom of the trade, they buy and sell the return coupons of railway tickets, "whether the same are stamped 'non-transferable' or not, for the reason that the term 'non-transferable' does not import any practical or legal meaning in the business, according to the understanding of the railways themselves, the ticket brokers, and the traveling public to whom said tickets are issued, who freely sell them to brokers, who in turn sell them to other persons desiring to use said tickets for transportation when genuine and *bona fide*." At the close of the paragraph it is declared that "respondents do not deny" that complainant, on the occasions
173 of the Mardi Gras festivals in New Orleans, issues reduced rate so-called non-transferable tickets, which tickets are, by common consent and understanding, all treated by the general traveling public, the railways and the ticket brokers as articles of property negotiable and transferable. And respondents deny fraudulent dealing in such tickets.

In paragraph X of the answer the following admissions are made: "Respondents admit that it is their hope and expectation to buy and sell the return portions of said U. C. V. Reunion tickets, but

they deny that they will solicit, induce or persuade the holders thereof to sell such return portions to respondents upon any false or fraudulent pretense or representation upon the part of respondents. Respondents admit that they, in common with the general public, have some knowledge of the character and terms of the proposed tickets; that they are informed and believe that such tickets will be issued at low rates, to induce and enable the traveling public to attend said reunion in large numbers; that respondents expect to offer the same for sale, if they shall acquire any of said tickets, and will sell such tickets to other than the original purchasers, for such price as they are willing to pay; and that it is no concern of the complainant, or its connections, or other railways, whether respondents make a profit or a loss on the proposed dealing in said U. C. V. Reunion tickets."

The answer denies in various paragraphs that respondents have committed or intend to commit any fraud in connection with the "scalping" of non-transferable tickets. It is also denied that complainant will suffer any loss, damage or injury by reason of the buying and selling of its non-transferable tickets by respondents. They deny the right of complainant to issue non-transferable tickets.

Paragraph- XIV and XV are as follows:

"Respondents admit that it is the custom and usage of complainant and its connections to issue railroad tickets at reduced rates to the traveling public on various occasions, such as expositions, conventions, Mardi Gras, reunions or other public gatherings, and that the tickets, which are usually issued by complainant, purport by their terms to be non-transferable, and to constitute a so-called

'special contract' in express terms between complainant, the
174 lines issuing same, all other lines over which the same entitles the holder to travel, and the original purchasers of said tickets, whereby the said original purchasers are forced to agree that said tickets shall not be transferred by them to any other persons; but respondents show that said tickets when issued by complainant, and its connecting lines, and other railways, on such occasions of expositions, reunions, conventions, Mardi Gras and the like, are in practice and by general consent and common understanding of the traveling public, the railways and the ticket brokers, when *bona fide* and genuine tickets, good for return passage over the lines of said complainant and its connections, and other railways, in the hands of the holders thereof, whether such holders be the original purchasers or not, that such practice and such understanding are common and general all over the United States; that such tickets are sold and dealt in as a legitimate business in every large city, to the knowledge of complainant, and such tickets are, and have been for many years, sold by complainant with full knowledge of the fact that they are in practice and general understanding of the traveling public, good in the hands of any holders."

"Respondents jointly and severally admit that each of them are, and have been for some time, separately engaged in the lawful business of buying, selling and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and

transfer the same to respondents, with the intent and purpose that such tickets shall be used by the second purchasers thereof; but respondents deny that such use is a violation of law or in fact of the terms thereof. And respondents deny any knowledge that such use of said tickets by persons other than the original holders is any fraud upon complainant or the railways issuing such tickets when the same are genuine and *bona fide*, and respondents again aver that it is a matter of no concern or interest to the complainant or the railways issuing such tickets, whether the original purchasers are the holders and presenters of the same, or whether the holder has purchased said ticket from the original purchaser, or whether such holder has purchased the same from a ticket broker, or whether, as frequently happens, one of such tickets is accidentally or otherwise exchanged for another of the same class and form."

175 On December 11, 1903, the complainant filed a general replication to the defendants' answer to the whole bill.

Mr. Ridgely, Division Passenger Agent, testified, among other things, that complainant was in the habit of issuing reduced rate round trip non-transferable tickets on the occasion of annual Mardi Gras festivals, and on other occasions of conventions or large public gatherings in New Orleans; that such tickets contain a contract signed by the purchaser, that they are not to be transferred, and were issued, as a rule, for one fare for the round trip, *i. e.*, at one-half of the regular rate of fare.

He produced forms of two classes of such reduced rate non-transferable tickets which are annually issued by complainant, *i. e.*, Mardi Gras tickets and Winter Tourist tickets. He testified that the Winter Tourist tickets were issued every winter in large quantities, and many of such tickets were, at the time he was testifying, outstanding and in use.

As to all such reduced rate non-transferable tickets, the witness declared, from knowledge derived from his experience that they were being scalped in large numbers by "scalpers," or "ticket brokers;" that complainant had done all it could to prevent this violation of its rights; that in innumerable cases conductors had returned to him tickets which they had taken up because scalped.

As to the pecuniary damage or injury to the business of complainant, which it is the object of this suit to prevent, his testimony is as follows:

"Q. What can you say as to the amount of pecuniary damage which the Louisville and Nashville Railroad sustains annually from the sale by scalpers of the round trip non-transferable tickets?"

"A. The scalpers succeed unquestionably in getting a large number of tickets over our line every year, running up into the hundreds, and possibly into the thousands. We have arrived at the conclusion from the large number of tickets our conductors have taken up, and I should judge that the Louisville and Nashville Railroad suffers every year from fifteen to eighteen thousand dollars, or more every year. On this division it is almost that amount."

George B. Cranmer, a veteran conductor in the employ of complainant, explained the tricks and devices resorted to by ticket

scalpers, and those who dealt with them, to make use of non-transferable tickets, and the efforts of complainant to prevent such use.

176 The defendants below took no evidence.

On January 23, 1904, defendants filed a joint and several demurrer to the whole bill, on the ground that the bill contained no matter of equity whereon the Court could base any decree or grant any relief to complainant, and that the case sought to be made by complainant was a moot case, and not a real controversy, and did not entitle complainant to any discovery or relief against defendants or any of them.

This demurrer was filed without leave of Court, after an answer to the whole bill and a general replication, and after the taking of complainant's evidence. The complainant took a rule on defendants to show cause why this demurrer should not be stricken from the files as irregularly filed, after an answer to the whole bill and without leave of Court previously obtained, or, in the alternative, to show cause why the demurrer should not be overruled as without merit. After hearing, the Court, without passing upon the motion to strike the demurrer from the files, ordered that it be overruled.

Nearly a year after the filing of their answer to the whole bill, after the case had been put at issue and complainant's evidence taken, defendants came into Court, and, on suggesting in general terms "that they are now advised that this Honorable Court is without jurisdiction *ratione materiæ* to hear and determine this cause; and that appearers desire at this time to formally present for the Court's consideration and decision their plea to the jurisdiction of the Court, and that until said plea to the jurisdiction shall have been disposed of by the Court's ruling, they ought to be relieved from the further defense to the cause upon its merits," obtained an order on complainant to show cause why they should not have leave to file a plea to the jurisdiction, and why, in the meantime, proceedings affecting the merits of the controversy should not be stayed.

On hearing, this rule was denied.

In its final decree the Court *a quo* found that the equity in the case was for the complainant and against the defendants, and that complainant was entitled to the relief which it prayed for against the defendants, so far as concerned the tickets covered by the two interlocutory injunctions previously issued, but not as to future issues of such or similar tickets. It was therefore ordered, adjudged and decreed that the injunction theretofore issued on the 16th day of May, 1903, enjoining defendants from buying, selling, dealing in, or soliciting the purchase or sale of the U. C. V. tickets, and that the injunction theretofore issued on February 8, 1904, enjoining defendants from trafficking in Mardi Gras tickets of February, 1904, be made perpetual. It was further decreed that as to

177 so much of the relief sought by complainant as related to non-transferable tickets to be issued hereafter, such relief be denied, without prejudice, however, to the right of complainant

to seek such relief by independent proceedings on or before each occasion that it may issue such non-transferable tickets.

The opinion of the Court was delivered by PARDEE, *Circuit Judge:*

We have given rather a full statement of the case to show that no important phase of it has escaped our attention.

The right of the Louisville & Nashville Railroad Company as a common carrier of passengers for hire to issue round trip excursion and tourist tickets at reduced rates is incontestable; and this right is in and for the public interest and profit and is of great value to the company. In issuing such tickets, in order to prevent imposition and fraud and prevent injury to its regular passenger business, the company has the right to contract with a person availing himself of reduced rates for identification of the person to whom the particular ticket is issued and that the ticket issued shall not be transferable, but shall be void in the hands of another person than the one to whom issued. See Mosher *vs.* Railway Co., 127 U. S. 390; Boylan *vs.* Hot Springs, &c., 132 U. S. 146.

The case shows that on complainant's and appellant's great system running through some nine States, with railroad connections in all directions, this line of business is of great dimensions and continuous transaction, and that the complainant has been from time to time issuing, and will be required from time to time to issue, and will issue, such tickets for reduced rates with special provisions for identification and non-transfer

The defendants and appellees are charged with buying and procuring the specially reduced rate tickets of the company from persons who have no right to sell or transfer them and then with selling or delivering them to persons traveling over the company's lines who have no right to avail themselves of the reduced rates and who, by tendering the said void tickets to the agents of the company and availing themselves of the same, perpetrate a fraud on the company, injuring it in its legitimate business and putting the company to large expenses and outlays. And the defendants insist that they expect to continue and will continue to buy and sell and deal in the said non-transferable tickets.

It is too plain for argument that the admitted dealings by the defendants in the non-transferable tickets of the company is a great injury to the company and a fraud on the uninformed persons induced to buy the same and that with those informed persons
178 who buy such tickets from the defendants to use in traveling over the company's lines the defendants are accessory to the proposed fraud.

It would be a waste of time and words to elaborately set forth in this opinion the arguments and authorities showing that the business of the defendants as outlined above is illegitimate and contrary to equity and good conscience.

The main and only important objection to granting relief to the company under the bill filed in the Circuit Court is that the Court is without jurisdiction.

This objection as set forth in the answer, the demurrer, or the

motion to file plea under Sec. 5 of the Act of 1875, is based on the proposition that the amount involved does not exceed two thousand dollars exclusive of interest and costs.

We have seen that the complainant is carrying on a legitimate line of business of great extent and that the defendants are and will continue depredating, infringing and injuring the complainant in said business, contrary to right and equity. The value of this line of business must necessarily be many times greater than the sum of two thousand dollars. We should do violence to common sense if under the established facts of this case we permitted ourselves to doubt it.

The actual injury measured in dollars that the defendants have inflicted, and if unhinderd will inflict depends upon the number of void tickets passing through their hands successfully imposed on the agents of the complainant and the amount the complainant may be compelled to expend for additional guards, conductors and inspectors to prevent the frauds resulting from the defendants' free hand in their illegitimate dealings. The bill shows that at the time it was filed enormous crowds of people were about to attend the United Confederate Veterans' Reunion at New Orleans, thousands of whom would travel over complainant's lines upon such reduced rate non-transferable tickets. One of the objects of this bill was to prevent the scalping of this large issue of U. C. V. tickets. The defendants admitted complainant's allegations in respect to the thousands of tickets to be issued and the large number who would travel thereon, and admitted their intention to buy and sell the same in disregard of the terms thereof. It was alleged that complainant would thus be defrauded of thousands of dollars, and that, by reason of the impossibility of detecting and preventing the sale and resale of such non-transferable tickets, complainant would be subjected to constant and frequently repeated losses and irreparable injury far exceeding the sum of five thousand dollars, exclusive of interest and costs.

179 It is further alleged that complainant was in the habit or business of issuing such reduced rate non-transferable tickets on the frequently occurring occasions of conventions and other like events bringing large concourses of people to New Orleans, as well as on the occasions of the annual Mardi Gras festivals, and that defendants were engaged in the business of inflicting great loss and irreparable injury upon complainant by soliciting and inducing the original purchasers of such tickets to sell the same to defendants who disposed of them to other persons to be used for passage on the trains of complainant. These allegations are substantially admitted in the answer. The bill alleges: "That the amount involved in this controversy exceeds, exclusive of interest and costs, the sum of five thousand dollars; that the value of the business which orator seeks to protect, and the rights which it seeks to have recognized and enforced, exceeds in the case of each defendant the sum of five thousand dollars, exclusive of interest and costs."

The uncontradicted evidence of Ridgely, in charge of the New Orleans Division of the complainant, is: "The scalpers succeed un-

"questionably in getting a large number of tickets over our line every "year, running up into the hundreds and possibly into the thousands. "We have arrived at the conclusion from the large number of tickets "our conductors have taken up, and I should judge, that the Louis- "ville & Nashville Railroad suffers every year from fifteen to eighteen "thousand dollars or more every year. On this division it is almost "that amount."

In Nashville, C. & St. L. Ry. Co. *vs.* McConnell, 82 F. R. 72, involving the matter of enjoining "scalpers" of reduced rate round trip tickets, and where the jurisdictional amount in controversy was denied, Judge Clark held:

"A preliminary question is made on the jurisdiction of this Court in respect of the amount or matter in controversy. Although this question is not first presented in argument, it must first be determined in ruling on the cases; for, if this Court is without jurisdiction, it is not within its province to determine the other questions raised. The contention is that these bills are substantially suits upon the ticket contracts, to recover damages for a violation thereof, or for specific execution thereof, and that the right of action is separate upon each ticket, and that such rights or claims cannot be joined together in this suit so as to make an amount that gives jurisdiction.

It is agreed, in order to save a large accumulation of costs,
180 that, if the Court entertains the opinion that there is jurisdiction against each defendant in a separate suit, no objection will be urged against entertaining suits against the defendants jointly. From what has been said, it will readily be seen that in my opinion these are in no just sense suits upon the contract, nor for specific performance, but are suits to protect the business of the complainants against the irreparable mischief being suffered by reason of the fraudulent use and abuse of these ticket contracts; and the amount or value of the matter in controversy is not the damage that might be specifically recovered in a suit upon any or more of these contracts, but is the protection furnished to the plaintiffs, and the loss prevented by the fraudulent use of any and all of these void papers. It is the value of the whole object of the suit to the complainant which determines the amount in controversy. In Railroad Co. *vs.* Ward, 2 Black 485, bill was brought to abate a public nuisance, and it was held that the true test of jurisdiction as to the amount was the value of the object to be gained by the bill, which object was the removal of the nuisance complained of. So, also in Railway Co. *vs.* Kuteman, 4 C. C. A. 508, 54 Fed. 552, the suit was by a railroad company for an injunction to restrain a shipper from prosecuting in the State Courts a multiplicity of suits for overcharge in freight, the question being over the right of the company to maintain a schedule rate under which the charges were made; and the Court held that the true test of the jurisdictional amount was the value of the right to maintain the rate, and not the particular sums involved in the separate suits. The exact language of the Court is:

"In a suit for an injunction the amount in dispute is the value of the object to be gained by the bill. Fost. Fed. Prac. Sec. 16. An injunction may be of much greater value to the complainant than the

amount in controversy in cases of dispute which have already arisen. Symonds *vs.* Greene, 28 Fed., 834; Whitman *vs.* Hubbell, 30 Fed. 81. The maintenance of its rates is the real subject of dispute, and the object of the bill and the value of this object must be considered. Railroad Co. *vs.* Ward, 2 Black 485. This value not being liquidated or fixed by law, the alleged value, especially on demurrer to the bill, must govern."

In Smith *vs.* Bivens, 56 Fed. 352, the bill for injunction was by the owner of a large body of land, valuable only for its pasturage
181 rights and privileges, to protect that right from use by cattle and stock owners, neighbors of the land of complainant, under authority of an act of the Legislature of South Carolina changing the previous law, which required owners of cattle and stock to keep them fenced in so as to exempt plaintiff's land, with other lands from the operation of the act. The Court held that the true test of the jurisdiction was the value of the entire pasturage right of the complainant which was to be protected, and not the amount as between the complainant and any one of the cattel owners proposing to use this right without compensation. Judge Simonton observed:

"The case comes within Railroad Co. *vs.* Ward, 2 Black 492; or as it is stated in Railway Co. *vs.* Kuteman, 4 C. C. A. 503, 54 Fed. 552, in a suit for an injunction the amount in dispute is the value of the object to be gained by the bill."

On the reasoning and authorities as given by Judge Clark and particularly on our own holding in Texas & Pacific *vs.* Kuteman, 54 Fed. 552, we are constrained to hold that on the facts pleaded and proved in this case the amount or value in controversy exceeds the sum of two thousand dollars exclusive of interest and costs.

The defendants contended in the Lower Court and learned counsel in elaborate brief here contends that for the wrongs to its business to be perpetrated by the defendants, the complainant has a complete and adequate remedy at law. Counsel cites a large number of adjudged cases wherein relief in equity was denied, because the remedy at law was plain, adequate, full and complete; but although well decided these cases furnish us no assistance. In the matter of the defendants' illegitimate, mischievous and fraudulent acts done and threatened, it would tax the ingenuity of counsel to point out any plain remedy at law and would be impossible to point out any remedy at law in any sense measuring out to the complainant complete and adequate relief.

In Pomeroy's Equitable Remedies, Vol. 2, Sec. 634, the matter of injunctions against frauds on contractual rights is discussed with the conclusion in regard to remedies against "scalpers" that remedies at law are inadequate and injunctions proper. Cases relied upon are cited in foot note, and of so late date as to include Judge Parlange's decision in the Circuit Court in the case now under review.

In Angle *vs.* Chicago, St. Paul, &c., Railway Co., 151 U. S. 1, 3, the Court says:

182 "It has been repeatedly held that if one maliciously interferes in a contract between two parties and induces one of

them to break that contract to the injury of the other, the party injured can maintain an action against the wrong-doer."

And see Flaccus *vs.* Smith, 199 Pa. State 128, and Raymond *vs.* Yarrington, 73 S. W. 800.

This doctrine is applicable to the case of a ticket scalper who induces, assists and enables the purchaser of a non-transferable railroad ticket to transfer the same, with a view to the ultimate sale of the non-transferable ticket to some person not entitled to use the same.

That the defendants to the bill filed in the Court below have repeatedly interfered and procured the violation of complainant's contract and propose to continue in the same line of action is fully shown in the pleadings and proof in the transcript.

The remedy at law is plainly inadequate, because not only involving a multiplicity of suits, but because of the difficulty of detecting each offense and of ascertaining pecuniary equivalents for the injury done to complainant's business and for the inconveniences, annoyances, extra expense, outlays and risks involved in the matter.

The case therefore shows an actionable wrong of a recurrent and continuing nature, and to prevent the same the complainant is entitled to an injunction. We think further that on the case made in the bill the injunction should be permanent, and we do not perceive the necessity or propriety of driving the complainant to file a bill for a special injunction on every occasion which it finds necessary in the conduct of its business to issue non-transferable tickets at reduced rates.

A Court of equity having jurisdiction of the parties and subject matter should in its final decree administer full relief. See Pom. Eq. Jur., Vol. 1, Sec. 242.

We find none of the errors assigned on the cross appeal well taken.

The cause is remanded to the Circuit Court with instructions to enter a decree in accordance with the views herein expressed; the costs of the appeal and the cross appeal to be paid by the defendants.

183 Filed 27 day of March, 1906.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1444.

LOUISVILLE AND NASHVILLE RAILROAD CO., Appellant,
vs.
MARCUS K. BITTERMAN ET AL., Appellees.

Appeal and Cross Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Before Pardee, McCormick and Shelby, Circuit Judges.

McCORMICK, *Circuit Judge*, dissenting:

I cannot concur in the judgment of the Court in this case. I think the decree appealed from should be reversed and the suit dismissed for want of equity in the bill. Moreover, as I read the record, there is no substantive averment or proof of damage incurred or threatened of any amount in value, or, at most, of only nominal amount. The damages, if any are shown, are sentimental.

And thereafter, on March 27th, 1906, in the record of the proceedings of said Circuit Court of Appeals, is a judgment in said cause, in the words and figures following, to-wit:

Judgment.

No. 1444.

LOUISVILLE & NASHVILLE RAILROAD CO.
v.
MARCUS K. BITTERMAN ET AL.

and

MARCUS K. BITTERMAN ET AL.
v.
LOUISVILLE & NASHVILLE RAILROAD CO.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that this cause be, and it is hereby,
184 remanded to said Circuit Court, with instructions to enter a decree in accordance with the views expressed in the opinion of this Court in this cause.

It is further ordered, adjudged and decreed that the appellees and cross appellants, Marcus K. Bitterman, Julius Mehlig and Charles T Kelsko, and the surety on the cross appeal bond herein, H. Michel,

be condemned, *in solido*, to pay the costs of the appeal and cross appeal herein, for which execution may be issued out of said Circuit Court.

March 27th, 1906.

185 I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the twenty-three pages next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the Court (except the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana) in a certain cause in said Court, numbered 1444, wherein Louisville & Nashville Railroad Company is appellant and cross-appellee, and Marcus K. Bitterman, *et al.*, are appellees and cross appellants, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of April, A. D. 1906.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

186 In the United States Circuit Court of Appeals, Fifth Circuit.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
MARCUS K. BITTERMAN ET AL.

and

MARCUS K. BITTERMAN ET AL.
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

It is hereby stipulated by and between the appellant and appellees and cross appellants and cross appellee, acting through their attorneys of record, that the certified transcripts of the record of the proceedings in the United States Circuit Court of Appeals, filed in the Supreme Court of the United States by petitioners at the time of the filing of their petition for writ of certiorari, can be taken as a return to the writ of certiorari issued by the Supreme Court, and the filing of a further certified transcript is hereby waived.

New Orleans, La., May 29th, 1906.

W. K. BITTERMAN ET AL.,
By HENRY L. LAZARUS,
Their Att'y.
LOUISVILLE & NASHVILLE
R. R. CO.,
By JOSEPH PAXTON BLAIR,
Solicitor.

Endorsed: No. 1444. Louisville & Nashville Railroad Company vs. Marcus K. Bitterman *et al.* Appeal and Cross Appeals. Stipulation. Filed 31 day of May, 1905. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

187 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing one page numbered from — to —, inclusive, contain a true copy of the stipulation in the case of Louisville & Nashville Railroad Company *versus* Marcus K. Bitterman *et al.*, No. 1444 (Appeal and Cross Appeal) as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 31st day of May, A. D. 1906.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

188 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Louisville & Nashville Railroad Company is appellant, and Marcus K. Bitterman, Julius Mehlig, and Charles T. Kelsko, are appellees, and Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, are appellants, and Louisville & Nashville Railroad Company is appellee, appeal and cross-appeal, which suit was removed into the said Circuit Court of Appeals by virtue of appeals from the Circuit Court of the United States for the Eastern District of Louisiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send with-
189 out delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of May, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

190 [Endorsed:] File No. 20,257. Supreme Court of the United States. No. 755, October Term, 1905. Marcus K. Bitterman *et al. vs.* Louisville & Nashville Railroad Co. Writ of Certiorari and return. Filed June 4, 1906.

In the United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of said Court, do hereby certify that I received the within writ on the 31st day of May, A. D. 1906, and, whereas, the attorneys for the parties therein named have, by a stipulation in writing filed in my office on this day, agreed that the certified transcript of the record of the proceedings in the United States Circuit Court of Appeals filed in the Supreme Court of the United States, by petitioners, at the time of the filing of their petition for certiorari, can be taken as a return to the writ of certiorari issued by the Supreme Court, and the filing of a further certified transcript is hereby waived. Therefore, in compliance with said writ, and by direction of the Judges of this court, I have made and attached hereto a certified copy of said stipulation as a return to the within writ.

Witness my official signature and the seal of said Court this the 31st day of May, A. D. 1906.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Appellant, &c.,

vs.

M. K. BITTERMAN *et al.*,
Appellees, &c.

JOSEPH PAXTON BLAIR, Esq.,
Attorney for the Louisville & Nashville R. R. Co.

Dear Sir.—The Complainant ishereby notified that the defendants, appellees and cross-appellants will, on Monday, the 30th day of April, 1906, upon their verified petition and the record in this cause, at the opening of court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which, and of the petition for writ of certiorari are herewith delivered to you, and any supplemental petition that may be drafted by associate counsel, and the brief to be prepared in support thereof to be handed to you before the day and date aforesaid) to the Supreme Court of the United States, in its Court Room

at the Capitol, in the City of Washington, District of Columbia.

HENRY L. LAZARUS,
Attorney for Petitioners.

The foregoing notice is hereby accepted, and delivery of copy thereof and of petition for writ of certiorari are hereby acknowledged.

New Orleans, La., April 19, 1906.

JOSEPH PAXTON BLAIR,
Attorney for L. & N. R. R. Co.

Presentation of motion has been duly postponed to May 14, 1906.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Appellant,

vs.

MARCUS K. BITTERMAN *et al.*,
Appellees.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Fifth Circuit.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, each and all of whom are citizens of the State of Louisiana, respectfully show:

I.—In a proceeding instituted by the Louisville & Nashville Railroad Company against your petitioners, the jurisdiction of the Circuit Court of the United States was invoked by said corporation, alleging itself to be a corporation created under the laws of the State of Kentucky, and there were

made defendants to said proceeding, David Pike, George H. Johnson, G. F. Young and J. F. Finney, all of whom, complainant averred, were, with your petitioners, citizens of the State of Louisiana.

Your petitioners, who, alone of those made defendants, were, as a matter of fact, citizens of the State of Louisiana, appeared as the sole defendants in the cause, the Court's jurisdiction of the cause being dependent solely upon diverse citizenship.

II.—Your petitioners represent that the ostensible purpose of complainant's bill is averred to be the protection of its contract rights, arising from the issuance by it of so-called non-transferable tickets. By complainant's bill defendants are charged, and they are admittedly engaged in the business of ticket brokerage, buying and selling in the usual course of business, the unused portions of railroad transportation.

The primary object of complainant's bill was to restrain defendants from trafficking in the unused portions of the alleged so-called non-transferable tickets issued by complainant for the United Confederate Veterans Reunion, who were about to hold a convention in the City of New Orleans, in the month of May, 1903. The tickets which the complainant sought to restrain the defendants from trafficking in were at the time of the filing of the bill, issued and were on the market.

For the consideration of the relief which your petioners seek in this proceeding, it will be necessary that the bill be considered in its entirety, and, therefore, no useful purpose would be served by an attempt to superficially review the bill of complaint in this petition. It is necessary, however, that the Court's attention be directed particularly to the jurisdictional averments embodied in paragraphs XIII to XIX of complainant's bill, wherein it is alleged that the injury which complainant would

suffer by the defendants' acts in trafficking in so-called non-transferable tickets issued by it, would exceed as to each defendant, the sum of five hundred dollars.

III.—Your petitioners represent that the real purpose of complainant's bill is artfully concealed; limited as the bill apparently is, to the tickets issued for the United Confederate Veterans Reunion, but that a close analysis of the bill supports the prayer for the broad and extensive relief which is sought. Nevertheless, it is a specious and an unwarranted attempt to seize the jurisdiction of the United States Court, and, under cover of its equitable powers, to secure the announcement of a rule of civil conduct, and by the anticipation of a concrete case, based upon complainant's future action in the issuance of so-called non-transferable tickets, to direct the enforcement of a decree by the use of the Court's extraordinary writ of injunction, carrying with it a legislative direction, the non-observance of which would insure the punishment necessarily following an infraction of the Court's writ.

IV.—The relief applied for and the relief accorded by the decree of the Honorable the Circuit Court of Appeals for the Fifth Circuit, is to award, in advance of the presentation of an existing case or cause of action, an injunction against your petitioners, and operative against all persons whomsoever, though not named in the bill, from and after the time when they severally have knowledge of the entry of the issuance of the writ of injunction restraining the defendants, and all other persons whomsoever, from buying, selling, dealing in, or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued, or to be issued by complainant, or

any other railroad company, used over the complainant's lines of railway, or any part of them, which, by the terms thereof, are sought to be made non-transferable ; or from soliciting, encouraging or procuring any person other than the original purchaser of said tickets to use or to attempt to use said tickets for passage on any train or trains of complainant, and particularly the so-called non-transferable, round-trip tickets issued on the occasion of the United Confederate Veterans Reunion to be held in the City of New Orleans in May, 1903.

The writ of injunction issued by the Circuit Court was made perpetual, and by the decree of the Honorable Circuit Court of Appeals, rendered by a divided court, the writ was enlarged to the full extent prayed for by complainant, so as to embrace every species of so-called non-transferable tickets, issued or to be issued by the complainant in the future.

V.— Your petitioners further represent that, upon their making appearance to complainant's bill, they at once, in order to meet its equities, and, if possible to defeat the temporary relief sought, made full and complete answer, and prayed that they might have the same advantage of their answer as if they had pleaded the several matters and things aforesaid, where a plea had been proper, or as if, on account thereof, they had demurred to said bill or parts thereof, where a demurrer would have been proper (Record, p. 41). The jurisdiction of the Court was specifically and pointedly challenged and the ground assigned was that this was not a controversy in which there was involved in any sense any sum of money whatever, and that no harm, damage or injury could come upon complainant in consequence of the doing by the defendants of any of the acts sought to be

restrained in complainant's bill. The answer fairly and fully meets every averment of complainant's bill, traverses every material fact, the basis of complainant's relief, and pleads specially that complainant has a complete and adequate remedy at law for any of the alleged injuries of which complaint is made.

Your petitioners crave the Court's consideration of the answer in connection with the bill.

VI.—Your petitioners further represent that, upon the filing of the general replication to the answer, the complainant administered its proof for final hearing, and having utterly failed to establish affirmatively that there was involved in the controversy any pecuniary interest whatever, or that, in consequence of the acts of your petitioners, complainant would sustain any damage whatsoever, your petitioners were advised it was not necessary for them to tender proof in support of their defense, and upon return of the evidence into Court, your petitioners ask leave to file a plea to the jurisdiction and averred that the allegations of pecuniary loss which would result to the complainant from the acts recited as against your petitioners, were made colorably and fraudulently to seize the jurisdiction of the Court (Record, p. 96).

Leave to file this plea was refused (Record, p. 97).

With the evidence before the Court on final hearing, the want of jurisdiction was again urged under the Act of 1875, but without avail.

VII.—Your petitioners further represent, that, pending the consideration of the bill against defendants trafficking in tickets issued by complainant for the United Confederate Veterans Reunion, and long after its force had been spent (Record, p. 89), complainant sought, by supplemental proceedings additional relief against your petitioners, and the bill

was enlarged so as to cover the issue by complainant of so-called non-transferable tickets for the Mardi Gras festivities in the city of New Orleans of the year 1904. Upon final hearing, Judge Parlange holding the Circuit Court, perpetuated, restrictedly, the temporary injunction which he granted (Record, p. 145). He limited his writ to the so-called non-transferable tickets requiring the signatures of the parties to whom they were issued, and left at large all other issues in the cause (Record, p. 147).

From the final decree complainant prosecuted its appeal and assigned *inter alia*, as error that the Court erred in not allowing the full measure of relief prayed for, and in not having issued its general writ of injunction directed to the whole world against dealing in so-called non-transferable tickets issued or to be issued in the future by complainant and its connecting lines.

The defendants cross-appealed, and assigned as error, among other matters, the absence of jurisdiction in the Circuit Court to hear and determine the cause at all, owing to the fact that there was not involved in the controversy a sum in excess of two thousand dollars, or any sum whatever, and that the jurisdictional averments contained in the bill (and unsupported by proof) were manifestly fictitious, fraudulent and colorable. There were other assignments of error by cross-appellees, not necessary here to recite, and which are formally set out in the assignment of errors in the transcript (Record, p. 154).

The Circuit Court of Appeals dismissed the defendant's appeal, and sustained that of the complainant, by a decision from which Judge McCormick dissented.

VIII.—The questions involved in this suit are of great public importance since upon their determi-

nation depends the right of hundreds of ticket brokers throughout the United States to carry on their business, which has heretofore been declared lawful and beneficial to the general public.

The Court of Appeals of New York, in *People ex rel. Tyroler* v. *The Warden of the City Prison, 157 N. Y., 116*, declared an Act of the Legislature, which undertook to prohibit the business, to be violative of both the State and Federal Constitutions. In the course of the prevailing opinion, Chief Judge Parker carefully examined into the nature of the business and the methods employed, and showed that the business was worthy of encouragement rather than to be condemned to destruction. The various charges as to its fraudulent nature were met, and on page 123 he said :

> "I confess I am unable to see how such a sale defrauds a transportation company. If a transportation company sells a ticket from New York to San Francisco, it undertakes to carry the holder from one place to the other. It costs the company no more to carry one person than it does the other. How then can it be defrauded or in any way prejudiced by the transfer of such ticket by the purchaser to another person."

A subsequent act of the Legislature of New York was likewise declared to be unconstitutional in *People ex rel. Fleischman* v. *Caldwell, 64 App. Div., 46; affd. 168 N. Y., 671*, the Court of Appeals on this occasion being unanimous. By this decision it was declared, that a railroad ticket was property in the hands of the holder, and was entitled to the protection afforded by the fundamental law to property rights.

Similar legislation was declared to be unconstitutional by the Supreme Court of Illinois in *Allardt* v. *People, 197 Ill., 501*, and by the Court

of Appeals of Texas in *Jannin* v. *State*, *51 S. W. Rep.*, *1126*, although in other States the validity of such legislation has been recognized.

Attempts were made to procure the passage of similar legislation in Louisiana and in other States, and by the Congress of the United States, but failed.

Notwithstanding these adjudications, that it is not within the power of the Legislature to prohibit the business of ticket brokerage, an attempt has recently been made in the courts, beginning with a decision by Judge Clark in the United States Circuit Court for the Middle District of Tennessee, rendered in 1897, in *Nashville, &c., Railway Co.* v. *McConnell*, *82 Fed. Rep.*, *65*, to prohibit ticket brokers from dealing in non-transferable tickets, by the granting of injunctions, and this decision has been sought to be extended so as to cover not only the case of limited tickets actually issued for a special occasion, but, in the present case, it is sought to extend the power of courts of chancery so as to permit them to grant injunctions restraining brokers from dealing with tickets not issued, or even contemplated, to be issued, and to lay down a rule of conduct for occasions, and under circumstances and conditions, which have not yet arisen, thus pronouncing judicial decrees which are in their essential nature legislative prohibitions.

Your petitioners contend that the ruling, decision and decree of the Circuit Court of Appeals in this cause, is not a judicial decision of a cause within its jurisdiction, but is, in its operative effect, a legislative mandate, announcing a rule of civil conduct, directed not only to the parties defendant in the cause, but to whomsoever said rule of conduct is communicated at any time in the future, and thus accomplish by the promulgation and publication of the Court's order notice to the

world ; bringing constructive knowledge home to the public, and at once subjecting those who violate the terms of its writ to punishment by contempt process.

Its effect is to enable the complainant and its connecting carriers, at their will and pleasure, to make the injunction operative in the future by issuing what they may be pleased to designate as "non-transferable tickets," or to withhold the effective force of this injunctive writ or suspend the rule of conduct announced by the Court in its decree by making all tickets transferable, thus placing it in the power of the corporation to say when the Court's process for contempt should be made effective.

There has been much contrariety of opinion in the various tribunals to which such applications have been made in recent years, and different rules obtain in the various jurisdictions which have thus far passed upon the question.

In the present case Judge Parlange, sitting in the United States Circuit Court for the Eastern District of Louisiana, while granting an injunction against the defendants, restraining them from selling limited tickets issued for the United Confederate Veterans Reunion held at New Orleans in May, 1903, and for the Mardi Gras held in February, 1904, adjudged :

> " that as to so much of the relief sought by the complainant as relates to non-transferable tickets to be hereafter issued, such relief is denied " (Rec., p. 147).

On appeal to the United States Circuit Court of Appeals, this limitation of the decree was reversed by a divided court, Judges Pardee and Shelby writing for a reversal and in favor of granting relief for all time, against all men, with respect to any tickets that might be issued at any time, while Judge McCormick dissented from the decision, and was of the

opinion that the suit should be dismissed for want of equity in the bill, and for lack of jurisdiction.

Consequently, of the four judges who have thus far passed upon this case, two have expressed opinions on the main question involved, in favor of the complainant, and two in favor of the defendants.

A similar question was considered in the Supreme Court of the State of New York in *New York Central & Hudson River Railroad Co.* v. *Reeves, 41 Misc. Rep., 490*, in 1903, where Mr. Justice Lambert, in an elaborate opinion, decided that the equitable relief prayed for could not be granted. The case was carefully argued and received the most painstaking consideration.

Concurrently with the consideration of that case in the State Court, Judge Hazel, in the United States Circuit Court for the Western District of New York, in *Delaware, Lackawanna & Western R. R. Co.* v. *Frank, 110 Fed. Rep , 689*, denied an application for an injunction such as that which was granted in the present case.

During the World's Fair at St. Louis, the question was considered by the Supreme Court of Missouri in *Schubach* v. *McDonald, 179 Mo., 163, s. c. 78 S. W. Rep., 1020*, where an application was made for a writ of prohibition to restrain the courts of first instance from further entertaining jurisdiction in suits brought for a purpose similar to the present. By a divided Court, the writ of prohibition was denied. The dissenting opinion, in which Justices Valliant and Gantt united, clearly states the objections to such an invasion of legislative power by the judicial branch of the government, in undertaking, by injunction, to lay down a rule for future action in respect to cases which may arise under varying conditions in years to come.

The precise question involved in these cases has not been passed upon by this Court, but recently,

in *New Haven Railroad* v. *Interstate Commerce Commission*, *200 U. S.*, *404*, Mr. Justice White had occasion to consider a proposition of kindred character, and to condemn the granting of an injunction of a nature similar to that of which the relators complain. He said:

> "The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the Court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Company* v. *United States*, *196 U. S.*, *375*. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce that a Court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *In re Debs*, *158 U. S.*, *564*, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise

> of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

The determination of this suit calls for the consideration of a number of important questions of equity jurisprudence, in addition to that already referred to, which the public interests require to have set at rest by the authoritative adjudication of this Court. They are:

(1) Assuming that the railroad companies have the right to make their tickets non-transferable, does any cause of action exist against a ticket broker who, having acquired a ticket, sells it to another?

(2) Assuming that an action at law might be maintained against a ticket broker who sells to another a non-transferable ticket which he has acquired, is a suit in equity maintainable to restrain a ticket broker from selling such ticket whether it has been issued for a special occasion or not, and can the broker be deprived of his constitutional right of trial by jury with respect to the charges of fraud and wrong-doing which are made against him in the bill of complaint?

On this point attention is called to the following decisions of this Court:

Hipp v. *Babin*, *19 How. U. S., 278.*
Parker v. *Winnipiseogee Lake Co.*, *2 Black, 551.*
Insurance Co. v. *Bailey*, *13 Wall., 621.*
Grand Chute v. *Winegar*, *15 Wall., 375.*
Root v. *Railway Co.*, *105 U. S., 212.*
Killian v. *Ebbinghaus*, *110 U. S., 573.*
Fussell v. *Gregg*, *113 U. S., 555.*
Buzard v. *Houston*, *119 U. S., 351.*

Whitehead v. *Shattuck, 138 U. S., 146.*
Cates v. *Allen, 149 U. S., 451.*

Special attention is called in this connection to

N. Y. C. & H. R. R. R. Co. v. *Reeves, 41 Misc. Rep., 490, and the cases there cited.*

(3) Has the United States Circuit Court jurisdiction over an action of this character, by the mere fact that the bill of complaint alleges that the injury sustained by the complainant in consequence of defendants' acts exceeds $2,000, where such jurisdictional averment is so manifestly fictitious as to make it legally certain that the amount of injury to the complainant's business which is alleged, is colorable and not actual?

(4) Can various ticket brokers, having no business relations to one another, and acting independently, be united as defendants in a single suit, brought for relief such as is prayed for in the present case, without offending against the rule with regard to multifariousness?

In the present case seven such defendants were united in a single suit. In *New York Central & Hudson River R. R. Co.* v. *Reeves*, sixty were so united. In other cases, upwards of twenty-five brokers, acting independently, were brought into one suit.

It is contended that this is contrary to the rule laid down in *Hale* v. *Allinson, 188 U. S., 56*, and numerous other decisions.

IX.—Petitioners further represent that, owing to the divergence of opinion between various State and Federal Courts on the questions involved in this suit, and especially as to the right of courts to control by process of injunction the trafficking by

ticket brokers in the unused portions of railroad transportation sold and paid for, and this through the announcement of a rule of conduct purely legislative in its character and not judicial, this Court is appealed to, to grant its writ so as to insure an authoritative decision upon the subject, and a settlement of the questions of law involved, which are both novel and important, and involve to a large extent the right to carry on a recognized business, which for upwards of a quarter of a century has been pursued throughout the country by hundreds of individuals, with the approval and patronage of the general public, the right to conduct which, is, as your petitioners are advised, protected by the Fifth and Fourteenth Amendments of the Constitution of the United States.

Your petitioners believe that the decree of the Circuit Court of Appeals, of which complaint is made, is erroneous and that this Honorable Court should require said cause to be certified to it for its review and determination in accordance with the provisions of the Acts of Congress in such cases made and provided.

WHEREFORE, your petitioners pray that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court of Appeals in the said cause therein, entitled "Louisville & Nashville Railroad Company v. M. K. Bitterman *et al*, No. 1444 of the docket of said court, to the end that the said cause may be reviewed and determined by this Court as provided in Paragraph 6 of the Act of Con-

gress entitled "An Act to establish Circuit Courts of Appeal, and define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this Honorable Court may seem proper and in conformity with the said act; and that said judgment of said Court of Appeals in the said case, and in every part thereof may be reversed by this Honorable Court.

And your petitioners will ever pray.

MARCUS K. BITTERMAN.
JULIUS MEHLIG.
CHARLES T. KELSKO.
By HENRY L. LAZARUS,
Petitioners.

STATE OF LOUISIANA,
Parish of Orleans,
City of New Orleans, } ss.:

HENRY L. LAZARUS, being first duly sworn, says: That he is one of the counsel for Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, the petitioners; that he has read the foregoing petition for *certiorari* and knows the contents thereof and that the allegations thereof are true, as he verily believes.

Subscribed and sworn to before me,
Herman Michel, Notary Public,
this 14th day of April, A. D. 1906.

Supreme Court of the United States.

OCTOBER TERM, 1906.

MARCUS K. BITTERMAN and others,
Petitioners,

against

No. 294.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

2

Sirs.—Please take notice that on the annexed affidavit of Louis Marshall, verified November 15, 1906, the consent of respondent's counsel, dated November 1, 1906, and the petition of Moritz Rosenthal, verified November 12, 1906, the petitioners will, on Monday, December 3, 1906, submit a motion to the Supreme Court of the United States, in its Court Room at the Capitol, in the City of Washington, District of Columbia, for a Rule or Order advancing this cause on the present docket of the Court, on the ground that the public interest requires a speedy determination of the questions arising therein.

3

Dated, November 15, 1906.

LOUIS MARSHALL,
HENRY L. LAZARUS,
MORITZ ROSENTHAL,
Attorneys for Petitioners.

To Messrs. GEORGE DENEGRE and
JOSEPH PAXTON BLAIR,
Counsel for Respondent.

Due service of the foregoing notice is hereby admitted.

Dated, New Orleans, La., November , 1906.

Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

MARCUS K. BITTERMAN and others,
Petitioners,

against

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

No. 294.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:
City and County of New York,

LOUIS MARSHALL, being duly sworn, deposes and says:

I am one of the attorneys for the petitioners herein. This cause was removed into this Court by writ of certiorari issued to the United States Circuit Court of Appeals for the Fifth Circuit on or about May 21, 1906.

The suit was brought by the respondent, Louisville & Nashville Railroad Company, against the petitioners, in the United States Circuit Court for the Eastern District of Louisiana, to restrain the defendants,and all other persons whomsoever, from buying, selling, dealing in, or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued or to be issued by the complainant, or any other railroad company, used over the complainant's lines of railway, or any part of them, which, by the terms thereof, were sought to be made non-transferable; or from soliciting, encouraging or procuring any person other than the original 8
purchaser of said tickets to use or to attempt to use said tickets for passage on any train.

A decree was rendered by said United States Circuit Court, which restrained the Petitioners from trafficking in tickets issued by the respondent for the United Confederate Veterans Reunion.

Cross-appeals were taken from such decision to the United States Circuit Court of Appeals, where the Petitioners' appeal was dismissed and that of the Respondent sustained, and an injunction was granted, referring not only to tickets theretofore 9
issued, but to any non-transferable tickets to be thereafter issued.

The questions involved in this suit are of great public importance, since upon their determination depends the right of hundreds of ticket brokers throughout the United States to carry on their business, which has heretofore been declared lawful and beneficial to the general public.

The Court of Appeals of New York, in *People ex rel Tyroler v. The Warden of the City Prison,*

157 N. Y., 116, declared an act of the legislature, which undertook to prohibit the business, to be violative of both the State and Federal Constitutions. In the course of the prevailing opinion, Chief Judge Parker carefully examined into the nature of the business and the methods employed, and showed that the business was worthy of encouragement rather than to be condemned to destruction. The various charges as to its fraudulent nature were met, and on page 123 he said:

> "I confess I am unable to see how such a sale defrauds a transportation company. If a transportation company sells a ticket from New York to San Francisco, it undertakes to carry the holder from one place to the other. It costs the company no more to carry one person than it does the other. How then can it be defrauded or in any way prejudiced by the transfer of such ticket by the purchaser to another person?"

A subsequent act of the legislature of New York was likewise declared to be unconstitutional in *People ex rel. Fleischman v. Caldwell, 64 App. Div., 46 aff'd. 168 N. Y., 671,* the Court of Appeals on this occasion being unanimous. By this decision it was declared, that a railroad ticket was property in the hands of the holder, and was entitled to the protection afforded by the fundamental law to property rights.

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Deponent contends, that the ruling, decision and 15 decree of the Circuit Court of Appeals in this cause, is not a judicial decision of a cause within its jurisdiction, but is, in its operative effect, a legislative mandate, announcing a rule of civil conduct, directed not only to the parties defendant in the cause, but to whomsoever said rule of conduct is communicated at any time in the future, and thus accomplish by the promulgation and publication of the Court's order notice to the world; bringing constructive knowledge home to the public, and at once subjecting those who violate the

16 terms of its writ, to punishment by contempt process.

Its effect is to enable the complainant and its connecting carriers, at their will and pleasure, to make the injunction operative in the future by issuing what they may be pleased to designate as "non-transferable tickets," or to withhold the effective force of this injunctive writ or suspend the rule of conduct announced by the Court in its decree, by making all tickets transferable, thus placing it in the power of the corporation to say when the Court's process for contempt should be made effective.

17

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18 in February, 1904, adjudged:

"That as to so much of the relief sought by the complainant as relates to non-transferable tickets to be hereafter issued, such relief is denied" (Rec., p. 147).

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time, while Judge McCormick dissented from the decision, and was of the opinion that the suit should be dismissed for want of equity in the bill, and for lack of jurisdiction. 19

Consequently, of the four Judges who have thus far passed upon this case, two have expressed opinions on the main question involved, in favor of the complainant, and two in favor of the defendants.

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Concurrently with the consideration of that case in the State Court, Judge Hazel, in the United States Circuit Court for the Western District of New York, in *Delaware, Lackawanna & Western R. R. Co. v. Frank, 110 Fed. Rep., 689,* denied an application for an injunction such as that which was granted in the present case.

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22 may arise under varying conditions in years to come.

The precise question involved in these cases has not been passed upon by this Court, but recently, in *New Haven Railroad v. Interstate Commerce Commission, 200 U. S., 404,* Mr. Justice White had occasion to consider a proposition of kindred character, and to condemn the granting of an injunction of a nature similar to that of which the petitioners complain. He said:

"The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the
23 duty of the Court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Company v. United States, 196 U. S., 375.* The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved
24 a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce that the Court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a Court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *In re Debs, 158 U. S., 564,* was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the pro-

ceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

The determination of this suit calls for the consideration of a number of important questions of equity jurisprudence, in addition to that already referred to, which the public interests require to have set at rest by the authoritative adjudication of this Court. They are:

(1) Assuming that the railroad companies have the right to make their tickets non-transferable, does any cause of action exist against a ticket broker who, having acquired a ticket, sells it to another?

(2) Assuming that an action at law might be maintained against a ticket broker who sells to another a non-transferable ticket which he has acquired, is a suit in equity maintainable to restrain a ticket broker from selling such ticket whether it has been issued for a special occasion or not, and can the broker be deprived of his constitutional right of trial by jury with respect to the charges of fraud and wrongdoing which are made against him in the bill of complaint?

On this point attention is called to the following decisions of this Court:

Hipp v. *Babin, 19 How., U. S., 278.*
Parker v. *Winnipiscogee Lake Co., 2 Black, 551.*
Insurance Co. v. *Bailey, 13 Wall., 621.*
Grand Chute v. *Winegar, 15 Wall., 375.*

28 *Root* v. *Railway Co., 105 U. S., 212.*
Killian v. *Ebbinghaus, 110 U. S., 573.*
Fussell v. *Gregg, 113 U. S., 555.*
Buzard v. *Houston, 119 U. S., 351.*
Whitehead v. *Shattuck, 138 U. S., 146.*
Cates v. *Allen, 149 U. S., 451.*

Special attention is called in this connection to

N. Y. C. & H. R. R. R. Co. v. *Reeves, 41 Misc. Rep., 490, and the cases there cited.*

29

(3) Has the United States Circuit Court jurisdiction over an action of this character, by the mere fact that the bill of complaint alleges that the injury sustained by the complainant in consequence of defendants' acts exceeds $2,000, where such jurisdictional averment is so manifestly fictitious as to make it legally certain that the amount of injury to the complainant's business which is alleged, is colorable and not actual?

(4) Can various ticket brokers, having no business relation to one another, and acting independ-
30 ently, be united as defendants in a single suit, brought for relief such as is prayed for in the present case, without offending against the rule with regard to multifariousness?

In the present case seven such defendants were united in a single suit. In *New York Central & Hudson River R. R. Co.* v. *Reeves*, sixty were so united. In other cases, upwards of twenty-five brokers, acting independently, were brought into one suit.

It is contended that this is contrary to the

rule laid down in *Hale* v. *Allinson, 188 U. S., 56* 31
and numerous other decisions.

On a petition showing the foregoing facts, the writ of certiorari was granted, as deponent assumes on the ground that owing to the divergence of opinion between various State and Federal Courts on the questions involved in this suit, and especially as to the right of Courts to control by process of injunction the trafficking by ticket brokers in the unused portions of railroad transportation sold and paid for, this Court granted said writ of certiorari.

On the decision of this cause by this Court a 32
large number of other cases are dependent, which have been brought in various jurisdictions. A large number of such cases are now pending in the United States Circuit Court for Illinois, in Colorado, Nebraska, and various railroad companies have threatened, as deponent is informed, to bring similar actions against various ticket brokers in other parts of the United States.

If the contention of the respondent is sustained, hundreds of ticket brokers throughout the country will be driven out of the business which they and their predecessors have conducted for nearly half a century.

It is of equal importance to the various railroad 33
and transportation companies engaged in business in the United States, as well as to the general public, that it be speedily determined, whether such relief as that which has been granted by the United States Circuit Court of Appeals for the Fifth Circuit can properly be granted, and whether the scope of an injunction can be extended to such a degree as is indicated by the record in this cause.

The attorneys for the respondent in this cause are equally desirous with the petitioners, to have this cause advanced for speedy argument. An-

nexed hereto is a stipulation between the counsel for the respective parties to this cause, indicating such desire.

There is also annexed hereto, the request of the counsel for various ticket brokers against whom suits are now pending in the United States Circuit Court for the Northern District of Illinois, indicating the necessity, so far as the causes in which he is engaged are concerned, for a speedy decision of the appeal herein.

WHEREFORE, deponent prays that this cause be advanced for hearing at such time as the Court shall deem proper.

LOUIS MARSHALL.

Subscribed and sworn to before me this 15th day of November, 1906.

EDWARD M. NEARY,
Notary Public, Kings County,
Certificate filed in New York County.
[NOTARIAL SEAL.]

SUPREME COURT OF THE UNITED STATES. 37

MARCUS K. BITTERMAN *et al.*,
Petitioners,

against

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

October Term, 1906.
No. 294.

38

It being deemed for the interest of the public, that the above cause be advanced on the docket of this term and set for argument at an early day, the undersigned, who are the counsel for the respective parties to said cause, hereby consent that a rule be entered advancing the cause and setting it for argument at the beginning of the session to be held in January, 1907, and unite in asking the Court to so advance the cause.

Dated, November 1, 1906.

HENRY L. LAZARUS,
LOUIS MARSHALL,
Counsel for Petitioners. 39

GEORGE DENEGRE,
JOSEPH PAXTON BLAIR,
Counsel for Respondent.

40 IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA,

OF THE OCTOBER TERM, A. D., 1906.

MARCUS K. BITTERMAN *et al.*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

No. 294.

41 To the Honorable, the Judges of the Supreme Court of the United States of America:

The undersigned respectfully represents that there are now pending in the Circuit Court of the United States in and for the Northern District of Illinois, the following cases, to wit:

Michigan Central R. R. Co. *v.* Bay,
Baltimore & Ohio R. R. Co. *v.* Bay,
Chicago, Burlington & Quincy R. R. Co. *v.* Bay,
42 New York, Chicago & St. Louis R. R. Co. *v.* Bay,
Wabash Railroad Company *v.* Geis,
Atchison, Topeka & Santa Fe R. R. Co. *v.* Geis,
Chicago & Erie R. R. Co. *v.* Bay,
Grand Trunk Western Ry. Co. *v.* Bay,
Oregon Short Line R. R. Co. *v.* Bay,
Union Pacific R. R. Co. *v.* Bay,
Oregon Railroad & Navigation Co. *v.* Bay,
Southern Pacific Company *v.* Geis,

Delaware, L. & W. R. R. Co. *v.* Bay, 43
New York Central & Hudson River R. R. Co. *v.* Bay,
Lehigh Valley R. R. Co. *v.* Bay, and
Chicago, Milwaukee & St. Paul R. R. Co. *v.* Bay.

That the undersigned is solicitor for the defendants in all of said cases; that there are like questions of law involved in each of said cases; that all of said cases are bills filed by complainant Railway Companies against divers ticket-brokers, wherein said Railway Companies are seeking to restrain said ticket-brokers from sell- 44
ing non-transferable contract tickets issued and to be issued by said Railway Companies; that in so far as said question is concerned, it is similar in its nature and scope to the question involved in said case of Bitterman *v.* Louisville & Nashville Railroad Company; that applications have been made by complainants in the above entitled causes so pending in said Circuit Court for temporary injunctions against said defendants, restraining them from selling and disposing of all non-transferable contract tickets issued and to be issued by said Railway Companies; that said Circuit Court has heretofore postponed the hearing 45
on said applications, for the purpose of ascertaining what action this Court might take in the advancement of said Bitterman case for hearing; that it is to the interest of all parties concerned that the questions herein involved should be authoritatively determined by this Court, speedily, because of the fact that the decision of this Court in said Bitterman case will affect and control the decision of said Circuit Court in all of said cases so pending before it.

46 It is, therefore, respectfully requested by the undersigned that the said Bitterman case be advanced on the calendar of this Court for a speedy hearing.

MORITZ ROSENTHAL.

STATE OF ILLINOIS,
County of Cook, } ss.:

MORITZ ROSENTHAL, being first duly sworn, on oath deposes and says: That he has read and subscribed the above petition, and that the facts set
47 forth in said petition are true; and further affiant saith not.

MORITZ ROSENTHAL.

Subscribed and sworn to before me this
12th day of November, A. D., 1906.

THOMAS W. BROWN,
(Notarial Seal) Notary Public,
Cook County, Illinois.

48

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1905.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent,

against

MARCUS K. BITTERMAN, *et al.*,
Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners' Points.

The history of this case and the nature of the questions involved are stated with sufficient fullness in the accompanying petition. In this brief, we shall strive to indicate that the case is one which, under the established rules of this Court, should be reviewed by it, and that the legal propositions presented are of a character which should be solved by an authoritative determination by this tribunal.

POINTS.

I.

This suit not only presents for consideration legal propositions of general public importance, but it is also true that the judges of the Courts below who have passed upon it, have been equally divided in opinion, and that a number of other tribunals which have had occasion to pass on similar questions, are in conflict.

(1) The case necessarily involves the right of hundreds of ticket brokers throughout the United States, to carry on a business which has heretofore been judicially declared to be lawful, and beneficial to the general public; in which a large amount of capital is embarked, and large property values are at risk. The railroads are also interested, and are seeking to secure by adjudication, that which they have failed to attain by legislation, owing to constitutional limitations.

People ex rel Tyroler v. Warden of City Prison, 157 N. Y., 116.
People ex rel. Fleischman v. Caldwell, 64 App. Div., 46; affd. 168 N. Y., 671.
Allardt v. People, 197 Ill., 501.
Jannin v. State, 51 S. W. Rep., 1126.

(2) The much mooted question, as to the extent to which courts may grant injunctions, is likewise directly presented. A subject of more general importance than this rarely arises.

(3) Four Judges have passed upon this case thus far—Judge Parlange in the United States Circuit Court, and Judges Pardee, McCormick and Shelby in the United States Circuit Court of Appeals. Two, Judges Pardee and Shelby, have united in rendering the decree which is sought to be reviewed. Two, Judges McCormick and Parlange, have expressed themselves in favor of the petitioners.

The opinions thus far rendered in this cause are, therefore, in a state of equilibrium. It would be most unfortunate if judicial problems of the importance of those presented by this record, should be determined as a finality, under such circumstances, especially since none of the other Circuit Courts of Appeals have had occasion to adjudicate these points.

(4) The other tribunals which have thus far been called upon to determine these propositions, are hopelessly at variance.

(a) The Supreme Court of New York, in *New York Central & Hudson River Railroad Co.* v. *Reeves, 40 Misc. Rep.,490,* decided that the relief which has been granted in this case cannot be granted by a court of equity.

(b) The United States Circuit Court for the Western District of New York, in *Delaware, Lackawana & Western Railroad Co.* v. *Frank, 110 Fed. Rep. 689,* denied an application for a similar injunction.

(c) Various Circuit and other Courts have granted injunctions relating to limited tickets issued for special occasions, but have refrained

from granting injunctions of the scope for which the respondent here contends.

Nashville &c. R. R. Co. v. *McConnell, 82 Fed. Rep., 65.*
Kinner v. *Lake Shore Ry. Co., 69 N. E. Rep., 614.*
Pennsylvania Ry. Co. v. *Beekman, 30 Wash. L. R. 715.*

(d) The United States Circuit Court in Missouri, in *Illinois Central Ry. Co.* v. *Caffrey, 128 Fed. Rep. 770,* however, granted a universal and blanket injunction.

(e) The Supreme Court of Missouri, in *Schubach* v. *McDonald, 179 Mo. 162,* was divided in opinion as to the power to grant injunctions of this far-reaching character, the dissenting opinion of Justices Valliant and Gantt being most pointed and direct in deprecating, what they considered to be, an invasion upon the legislative power of the State.

(f) Cases are now pending in various Federal and State courts, particularly in Illinois and Colorado, in which the right to similar injunctions is contended for by the railroad companies.

(5) In this confused state of the law, all interests must naturally turn to this Court for the purpose of silencing further conflict and of reconciling this diversity of judicial opinion.

II.

The injunction order which has been granted by the Circuit Court of Appeals, in laying down a rule as to conditions and circumstances which have not yet arisen, and as to the petitioners' right to deal with tickets which are not in esse, and which are not even in contemplation, is, in effect, an exercise of legislative as distinguished from judicial power, and is violative of the most elementary principles of justice.

The opinion of Mr. Justice Valliant in *Schubach* v. *McDonald* (*supra*), presents a convincing argument against the exercise of the power which the Circuit Court of Appeals for the Fifth Circuit has assumed with scant consideration; and the opinion of Mr. Justice Lambert, in *New York Central & Hudson River R. R. Co.* v. *Reeves, 41 Misc. Rep. 490*, may likewise be profitably consulted for a practical as well as a theoretical treatment of this phase of equity jurisdiction.

It is often important to return to first principles and elementary theories, lest, in an effort to reach a result which may answer the desires of the moment, infinite mischief may be wrought. Hence we may be pardoned for referring to authorities which may at first blush seem trite or academic.

Montesquieu says in his *Spirit of Laws*, p. 174:

"There is no liberty if the judicial power be not separated from the legislative. * * * Were it joined with the legislative the life and liberty of

the subject would be exposed to arbitrary control, for the judge would then be the legislator."

Judge Cooley, in his *Principles of Constitutional Law*, p. 44, recognizes the truth of this observation:

"The legislative power is to make laws and alter them at its discretion; the executive is the power to see that the laws are duly executed and enforced; the judicial power is the power to construe and apply the law when controversies arise concerning what has been done or omitted under it. Legislative power, therefore, deals entirely with the future, and the executive power with the present, *while the judicial power is retrospective, dealing only with acts done or threatened, promises made and injuries suffered.*"

In *Osborne* v. *Bank of the United States, 9 Wheat., 319*, Chief Justice Marshall discusses the judicial power with reference to the clause of the Constitution of the United States extending the judicial power in all cases in law and equity arising under the Constitution, law and treaties, and says:

"That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."

And he adds:

"The judicial power is exercised in the decision of cases. The legislative in the making of general regulations by the enactment of laws. The latter acts from considerations of public policy; the former is guided by the pleadings and evidence in the case. * * * Indeed, laws in courts have their origin in the necessity of rules and means to enforce them, to be applied to cases and controversies within their jurisdiction; and our whole

idea of the judicial power is the power of the latter to apply the former to the decisions of those cases and controversies."

John Stuart Mill remarks in his *"Considerations on Representative Government,"* p. 326:

"That the eminently beneficial working of the judicial system in this country, as remarked by De Tocqueville, is in great measure attributable to the peculiarity inherent in a court of justice acting as such—namely, that it does not declare the law *eo nomine* and, in the abstract, but waits until a case between man and man is brought before it, judicially involving the point in dispute, from which arises the happy effect that its declarations are not made in a very early stage of the controversy; that much popular discussion usually precedes them; that the court decides, after hearing the point fully argued on both sides by lawyers of reputation; decides only so much of the question at the time as is required by the case before it, and its decision, instead of being for political purposes, is drawn from it by the duty which it cannot refuse to fulfil of dispensing justice impartially between adverse litigants."

There is no distinction between courts of law and courts of equity in respect to this fundamental line of demarcation between the judicial and the legislative power. Thus, in *13th Law Quarterly Review, p. 362,* in his article "Government by Injunction," Mr. W. H. Dunbar observes:

"Courts of equity, like courts of law, are established for the determination of controversies between individuals. The power to issue preliminary injunctions is incidental to the power to determine such controversies. The right to lay down general rules for the government of the community; to declare *ex cathedra,* in advance of any contentious proceedings, in which the question arises, what may and what may not be law-

fully done, and to impose on the whole community a duty to refrain from doing a certain act, is in its entirety a legislative act. The jurisdiction of the court depends upon the existence of a case in which it is called upon to adjudicate."

In *Chartiers Coal Co.* v. *Mellion, 152 Pa., 286,* the Supreme Court of Pennsylvania decided that it was for the legislature rather than for the judiciary to lay down the rules fixing the rights of the owners of the different strata of the earth in the mining regions.

In *Bates* v. *Kimball, 2 D. Chipman, 37,* the Supreme Court of Vermont sententiously declares:

"No power can properly be a legislative and a judicial power at the same time; and as to mixed powers, the separation of the departments in the manner prescribed by the Constitution precludes the possibility of their existence."

In *State ex rel.* v. *Aloe, 152 Mo., 456,* the court said that in determining the limits of the judicial power the Chancellor cannot, by excursions beyond its domain, produce conditions to make jurisdiction for itself by forestalling and anticipating facts.

Courts deal with controversies concerning legal rights when such rights are created, or come into existence; when rules of civil conduct are established by the legislative power, it is for the courts to see that they are obeyed, and it is only when the controversies arise in the determination of the legal rights and duties growing out of given circumstances in human affairs that cases can be presented for judicial cognizance. Hence arises our *case* law and the development of our jurisprudence, by the judicial determination of actual existing controversies. The uneven de-

velopment of our jurisprudence growing out of its dependence upon case law and its subsequent irregular evolution is thus commented upon by ex-Judge Dillon in his Law and Jurisprudence of England and America, p. 236:

"Judicial power can, of course, be exerted only as cases arise for decision. It was entirely fortuitous, when, if ever, a given point would arise for judgment, and only such points as actually arose could be authoritatively dealt with by the courts."

He quotes from Sir Frederick Pollock's "Essays on Jurisprudence and Ethics":

"The law depends upon the casual exigencies of litigation to determine what parts of it shall be filled up and what left incomplete. * * * All kinds of curious little questions receive elaborate answers, while great ones remain in a provoking state of uncertainty."

All our courts, therefore, are limited in the exercise of their judicial power to the determination of the cases presented in the actual exigencies of litigation. We have nothing analogous to the annual edict of the Roman Praetor, the *edictum perpetuum* issued on his taking office, announcing the system adopted by him for the decision of cases during his magistracy. We are told that these annual edicts in their announcement of principles were important factors in the development of the Roman Law. In our jurisprudence we have nothing of the kind, and we are forced to content ourselves with the exercise of the judicial power, limited to the decision of concrete cases as they arise incidentally in the course of human affairs.

This thought underlies the decision of this Court in *New Haven Railroad vs. Interstate Commerce Commission, 200 U. S., 404,* where Mr. Jus-

tice White forcibly denounces injunctions like that which the Circuit Court of Appeals has promulgated in this case:

"The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the Court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Company v. United States, 196 U. S., 375.* The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce that a Court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *In re Debs, 158 U. S., 564,* was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

In *Swift* v. *United States, 196 U. S. 375, 396, 401,*

Mr. Justice Holmes, speaking of a decree granting an injunction, said:

"On the other hand, we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can. * * * The general words of the injunction 'or by any other method or device the purpose and effect of which is to restrain commerce as aforesaid,' should be stricken out. The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objections which we stated at the beginning that it was our duty to avoid."

The business of a ticket broker has been declared to be in every respect lawful by the Court of Appeals of the State of New York in two well considered cases, *People ex rel. Tyroler v. Warden of Prison* (*157 N. Y., 116*) and *People ex rel. Fleischmann v. Caldwell* (*168 N. Y., 671, affirming 64 App. Div., 46*).

The doctrine has been further approved by the Supreme Court of that state in *New York Central & Hudson River Railroad Company v. Reeves, 41 Misc. Rep., 490.*

These decisions were rendered in the face of two statutes which sought to prohibit the business of ticket brokerage, but they were declared to be unconstitutional in that they were an infraction upon the liberty of the citizen.

Neither the Congress of the United States or the Legislature of Louisiana has undertaken to prohi-

bit the business in which the defendants are engaged. They have both refused to legislate against it. It certainly is not a business unlawful at common law. Hence the defendants have a right to engage in it. Yet the purpose of this action is to absolutely restrain the defendants from carrying on a business which has heretofore been considered legitimate and which has been largely supported by the railroad companies, who have made use of it as an agency to enable them to compete with each other, especially the weaker railroads against the stronger.

While we may assume that a railroad company has the right to sell tickets on any conditions which are reasonable, and to impose upon those who purchase from it, such conditions, it by no means follows that a ticket broker, who is under no contractual relation to the railroad company, is thereby debarred from acquiring these tickets, or from disposing of them to any person who may desire to purchase them. At all events the act of the broker does not violate any affirmative rule of law, or any obligation which he owes to the railroad company which may have issued the tickets.

But assuming that circumstances might arise which would afford the basis of an action on the part of a railroad company against a ticket broker handling its tickets, it is difficult to understand how in anticipation of actual wrongdoing on the part of a ticket broker a court can grant relief either at law or in equity. Such intervention would not be judicial in its nature. As well might a court grant an injunction against a grocer from selling adulterated sugar; or against a drygoods merchant from giving short measure; or a coal dealer from giving short weight. On the same theory trade unions might be enjoined from car-

rying on their operations, because it may be apprehended that they may transgress the rights of the person seeking an injunction in a contingency which may arise in the future.

Without multiplying authorities on this proposition, attention is called to the following:

In *Delaware & Raritan Canal Co. v. Camden & Atlantic R. R. Co.* (*15 N. J. Eq., 13*) it appeared that the complainants had the exclusive franchise of transporting passengers and freight by railway across the State of New Jersey between the cities of New York and Philadelphia. The defendant, the Camden & Atlantic R. R. Co., was incorporated to construct a railroad across the State from Camden to the sea, and the Raritan & Delaware Bay R. R. Co. to construct a railway from Raritan Bay to Cape Island. The defendants undertook to join these two railroads at their point of intersection, so as to form with the aid of steamboats on the Delaware River and Raritan Bay a continuous line which, by possibility, might be used for the transportation of passengers and merchandise across the State between the cities of New York and Philadelphia. It was assumed that the complainant had an exclusive franchise for transporting passengers across the State of New Jersey between these two points.

It was nevertheless held, that there being a legitimate purpose for which the defendants' roads might be constructed and used and for which a junction between them might be formed, they could not be restrained from effecting such junction merely because it might be perverted to an unlawful purpose.

In *Thomas v. Musical Mutual Protective Union* (*121 N. Y., 45; s. c. 8 L. R. A., 175*), it was held that

courts do not sit for the purpose of determining speculative and abstract questions of law, or laying down rules for the future conduct of individuals in their business and social relations, but are confined in their judicial action to real controversies, wherein legal rights of parties are necessarily involved and can be conclusively determined. Accordingly in that case it was decided that an adjudication could not be obtained in advance as to the validity of the by-laws of an incorporated association on an application for injunction by a member who had been cited to show cause why he should not be punished for violating such by-laws, unless such punishment would subject him to irreparable injury and other adequate means of redress were not open to him. Chief Judge Ruger in the course of his opinion said:

"However desirable it may be for the members of financial, industrial and social organizations to be acquainted with the legal force and effect of rules and by-laws adopted by such societies for the purpose of regulating the conduct and action of its members, it furnishes no reason why courts should entertain jurisdiction of actions, either legal or equitable, brought for the mere purpose of obtaining such information, whether they be instituted in behalf of the member bringing the action alone, or in that of all the associates in the corporation. It is only when some injury has been inflicted on a person, or some right of property has been invaded, destroyed or prejudiced by the action of such corporation, that a member is entitled to maintain an action in the courts for redress or protection. Courts do not sit for the purpose of determining speculative and abstract questions of law or laying down rules for the future conduct of individuals in their business and social relations; but are confined in their judicial action to real controversies wherein legal rights of

parties are necessarily involved and can be conclusively determined. Bigelow *v.* Hartford Bridge Co., 14 Conn., 565."

To the same effect is the decision of the Supreme Court of Missouri in *Flint* v. *Hutchinson Smoke Burner Co., 110 Mo., 492.*

III.

The complainant has shown no sufficient ground for equitable intervention since, assuming, but not admitting, that the acts charged against the defendants are wrongful, tortious and fraudulent, it has a plain, adequate and complete remedy at law to redress such wrongs.

The Judiciary Act of 1789, which defines the jurisdiction of the Federal courts, declares that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law."

The Seventh Amendment of the Constitution declares that "in suits at common law where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved."

This provision of the Judiciary Act has been frequently applied, even by the courts *sua sponte,* so that it has become a rule of constant application that whenever a court of law is competent to take cognizance of a right and has power to pro-

ceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law because the defendant has a constitutional right of trial by jury.

Hipp v. *Babin, 19 How. U. S., 278.*

Thus in *Parker* v. *Winnipiseogee Lake Co.* (*2 Black., 551*), a suit for diversion of plaintiff's water was held not maintainable where an adequate remedy to recover damages existed at law.

In *Insurance Co.* v. *Bailey* (*13 Wall., 621*), jurisdiction of a suit to cancel a policy obtained through fraud, and which constituted a defense to a suit on the policy, was denied.

In *Grand Chute* v. *Winegar* (*15 Wall., 375*), equitable relief against the obligation of illegally issued municipal bonds as to which a legal defense existed, was withheld.

In *Root* v. *Railway Co.* (*105 U. S., 212*), a bill for account of profits and damages for infringement of an expired patent was dismissed on the ground of want of jurisdiction.

In *Killian* v. *Ebbinghaus* (*110 U. S., 573*), jurisdiction of a bill in the nature of a bill of interpleader was denied where the desired relief was obtainable in ejectment.

In *Fussell* v. *Gregg* (*113 U. S., 555*), jurisdiction of a bill against trespassers by the owner of the equitable title for possession was denied.

In *Buzard* v. *Houston* (*119 U. S., 351*), it was held that a bill to recover damages for fraud and deceit which might be recoverable in a legal action could not be maintained.

In *Cates* v. *Allen* (*149 U. S., 451*), it was held that a contract creditor who has not reduced his claim to judgment has no standing in a court of

equity upon a bill to set aside and vacate a fraudulent conveyance.

In *Whitehead* v. *Shattuck* (*138 U. S., 146*), a bill to quiet title to real estate was held not maintainable since the remedy by ejectment was adequate.

It is unnecessary to multiply citations to decisions of this court, but it may prove more useful to consider more closely a number of the cases to which reference has been made.

Thus in *Grand Chute* v. *Winegar* (*supra*), the bill of complaint alleged that the bonds of the complainant, a municipal corporation, were issued without authority, in violation of law and in fraud of the town; that the obligee knew this when he took them; that his possession was merely colorable; that he parted with no value, and never had any right or title to the bonds. The relief sought was to enjoin the obligee from proceeding and to compel the surrender of the bonds.

In its general nature the action was very much like the present, yet it was held that it could not be maintained. Mr. Justice Hunt said:

"The right of trial by jury is a great constitutional right, and it is only in exceptional cases and for specified causes that a party may be deprived of it. It is in vindication of this great principle, and as declaratory of the common law, that the Judiciary Act of 1789, in its sixteenth section, declares 'that suits in equity shall not be sustained in either of the courts of the United States in any case where adequate and complete remedy may be had at law.'

"A demurrer having been interposed to the present bill, all of its allegations are to be taken as true. This is so both in favor of the plaintiff and against him. It seems quite clear upon the statements of the bill that the defence to the suit at law upon the bonds is adequate and complete. Thus, the bonds, it is alleged, were issued without au-

thority and in fraudulent violation of the duty of those having the subject in charge. It is not suggested that there is any difficulty, either legal or practical, in establishing these facts by competent proof. If proven, they furnish as complete a defence to the suit at law to recover the amount of the bonds as they do in equity. In each suit the question arises, were they received by Winegar before their maturity, without knowledge of the defence, and for a valuable consideration by him paid on the purchase thereof? * * *

"A judgment against Winegar in the suit brought by him would be as conclusive upon the validity of the bonds, would as effectually prevent all future vexatious litigation, would expose the fraud, and prevent future deception as perfectly and thoroughly as would a judgment in the equity suit. Under such circumstances there is no authority for bringing this suit in equity."

In *Buzard* v. *Houston* (*supra*), a bill in equity alleged that the defendant, after agreeing in writing to sell to the plaintiff a certain number of cattle at a specified price, induced him to surrender the agreement and to receive instead thereof an assignment from the defendant of a similar contract of a third person with him, and also to pay the defendant a sum of money, and to give an obligation to pay him another sum, by false and fraudulent representations as to the solvency of that person; and prayed for a cancelation of the assignment and obligation, for a reinstatement and confirmation of the original agreements and their enforcement on such terms as the court might direct, or else for a repayment of the sum paid, and for damages and further relief.

As has already been stated, it was held that a suit in equity could not be maintained, Mr. Justice Gray saying:

"The present bill states a case for which an action of deceit could be maintained at law, and would afford full, adequate and complete remedy."

It was sought to maintain the action upon the theory that the case involved the element of fraud, but it was decided that that would not justify equitable intervention. It was further insisted that equity would intervene because the bill prayed for a discovery, but Mr. Justice Gray said:

"It is enough to say that the case clearly falls within the statement of Chief Justice Marshall: 'But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law." Russell *v.* Clarke, 7 Cranch, 69, 89."

In *Root* v. *Railway Co.* (*supra*) jurisdiction was also sought to be justified on the theory that in order to give the plaintiff complete relief the defendant should be required to account and to make discovery of his profits as an infringer of a patent, but in a most elaborate opinion by Mr. Justice Matthews the existence of jurisdiction was denied. At page 207 he said:

"It is the fundamental characteristic and limit of the jurisdiction in equity that it cannot give relief where there is a plain and adequate and complete remedy at law; and hence it had no original, independent, and inherent power to afford redress for breaches of contract or torts, by award-

ing damages; for to do that was the very office of proceedings at law."

The court then cites and follows the case of *Hipp* v. *Babin* (*supra*), and at page 215 says:

"Our conclusion is, that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is, to secure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but, that grounds of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances as furnishing a clear and satisfactory ground of exception from the general rule."

In the cases cited, and in many others which might be added, there are to be found the same elements as those which exist in the present case.

In *Grand Chute* v. *Winegar,* negotiable bonds had been issued without authority and were in the hands of one who had notice of their invalidity. This corresponds to the element in the present case which is involved in the allegations that non-transferable tickets have been issued or will be issued by the complainant, and have been or

will be acquired by the defendants under circumstances indicating knowledge on their part that the vendor in disposing of them is violating the terms of the tickets.

In *Buzard* v. *Houston*, there was the element of fraud and deceit.

In *Root* v. *Railway Co.*, the defendant was a tortious violator of the complainant's rights as an inventor and interfered with the latter's enjoyment of the right secured to him under his letters patent.

Yet in all of these cases it was held that equity would not intervene because there was an adequate remedy at law.

Here the bill of complaint shows that the complainant was possessed of numerous legal remedies, again assuming that any wrongs were perpetrated. It had the right to take up the tickets if presented by a party other than the original purchaser. It had the right to proceed by action at law against such purchaser. If the complainant had any cause of action against the defendants whatsoever it certainly could proceed against such of them as invaded its rights by an action at law to recover the damages inflicted upon it. The foundation of the complainant's cause of action must be a breach by the defendants of a legal right appertaining to it. An analysis of the bill of complaint indicates that the right claimed to have been invaded was, if anything, asserted to be a right of property. If such a right was violated, then of necessity such infraction must be cognizable in an action at law.

The complainant recognizes that the alleged injury inflicted is measurable in money damages, for it alleges that it has been and will be injured in a sum exceeding five thousand dollars. That

fact of itself indicates that there is no necessity for equitable intervention.

But it is claimed that equity should grant relief in this case because thereby a multiplicity of actions might be avoided, and that in many instances the persons who travel on tickets sold by the defendants are not within the jurisdiction of this court, or are insolvent.

The mere fact of the insolvency of such persons is not sufficient to become the basis of equitable intervention; otherwise equity might intervene to give relief in cases of assault and battery, or for any tort or breach of contract that may be committed. Neither is the fact that some of the parties who might be proceeded against are not within the jurisdiction of the court a sufficient ground for intervention. They can be proceeded against elsewhere.

But so far as the defendants are concerned it is immaterial whether or not the person traveling upon a non-transferable ticket can be proceeded against. The question is, whether or not so far as the defendants have been guilty of a wrongful, tortious or fraudulent act they can be proceeded against. There is no question but that they are within the jurisdiction of the court. It is not pretended that they are insolvent; nor is it necessary that as to them there shall be a multiplicity of suits. Even though they should be guilty of numerous violations of complainant's rights, such violations could be made the subject of a single action; and even if numerous actions should be brought there is adequate provision for the consolidation of such actions.

As further illustrating these views cases from other jurisdictions may be cited.

In *3 Pomeroy's Equity Jurisprudence, Section 1338,* the author says:

"Equity will not interfere to restrain the breach of a contract or the commission of a tort or the violation of any right when the legal remedy of compensatory damages will be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which under the settled doctrine determines the right."

Jersey City v. *Gardiner, 33 N. J., 622.*
Parker v. *Winnipiseogee, 2 Black, 545.*
Watson v. *Sutherland, 5 Wall., 7.*
North v. *Peters, 138 U. S., 271.*

An injunction will not be granted to restrain arrests.

Davis v. *American Soc. Prev. Cruelty to Animals, 75 N. Y., 362.*

Neither will an injunction be granted to restrain criminal acts.

Life Association v. *Boogher, 3 Mo. App., 173.*

The American courts have declined to extend the jurisdiction of equity to the extent of restraining such torts as libels on business, slanders of title, and the like.

Thus, in *Raymond* v. *Russell* (*143 Mass., 295*), Chief Justice Morton said:

"It is not within the jurisdiction of a court of equity to restrain by injunction representations as to character and standing of plaintiff or as to his property, although such representations may

be false, if there be no breach of trust or of contract involved."

Boston Diatite v. Florence Mfg. Co., 114 Mass., 69, and cases cited.
Whitehead v. Kitson, 119 Mass., 484.
Prudential Assurance v. Knott, L. R. 10 Ch., 142.

In *Life Association v. Boogher* (*3 Mo. App., 173*), it was likewise held that an injunction to restrain a libellous publication concerning the plaintiff's business was not to be granted.

In *Modern Fire Arms Co. v. Shields* (*171 N. Y., 384*), it was held that the publication of an unjust and malicious criticism of a manufactured article is not the subject of equitable cognizance, although the manufacturer has no remedy at law because of inability to prove special damages; citing many cases.

In *Tiede v. Schneidt* (*74 N. W. 798, Wisc.*), it was held that equity cannot restrain the maintenance of a slaughter house on a stream flowing through a city merely because it was made a misdemeanor by statute.

In *Rochester v. Walters* (*60 N. W., 1101,* Indiana), it was held that an injunction would not be granted at the suit of a municipality to restrain the erection of a wooden building in violation of a penal ordinance.

To the same effect is *Mayor, &c. v. Smyth* (*10 Atl. 700, N. H.*).

In *State* v. *Patterson* (*37 S. W., 478, Texas*), it was held that equity will not enjoin the commission of the statutory offense of keeping a common gambling house.

To the same effect is *People ex rel. L'Abbe v. District Court, 26 Col., 386.*

In *Ocean City Assn.* v. *Schurch* (*57 N. J. Eq., 268*) it was held that an injunction would not be granted to restrain the violation of a covenant in a deed against doing business on the premises on Sunday on the ground that such act was criminal.

In *O'Brien* v. *Harris* (*105 Ga., 732*), it was held that equity has no jurisdiction to interfere in matters merely criminal, or to enjoin any one from the commission of a crime when it does not appear that the acts complained of affect any property rights of the petitioners.

In *City of Mount Vernon* v. *Seeley* (*74 App. Div., 50*) it was held that a city could not maintain an action to enjoin the defendants from posting bills in violation of a city ordinance.

In *Davis* v. *American Society for the Prevention of Cruelty to Animals* (*78 N. Y., 362*), it was held that an injunction could not be granted to restrain an officer of the defendant from making arrests on the ground that the acts complained of were not violations of the statute.

In *Fisher* v. *Lakeside Park Hotel & Amusement Co.* (*4 Ohio, 329*), it was held that an injunction will not be granted on the suit of a private person to enjoin the violation of the Sunday law, since equity has no jurisdiction in matters merely political, illegal or immoral.

In *Christie Street Com. Co.* v. *Board of Trade* (*92 Ill. App., 604*), it was held that equity has no jurisdiction to restrain the using of market quotations in the illegal business of bucket-shop keeping since the scope of equity jurisdiction is to enforce or protect civil rights and property interests, and it cannot interfere for the prevention of crimes.

In *York* v. *Yzaguairre* (*71 S. W., 563*), it was held that an injunction cannot be granted to restrain a barber from keeping his shop open on Sunday in violation of a provision of the Penal Code.

A court of equity has no jurisdiction to restrain the collection of a promissory note which has been materially changed after its execution.

Mutual Life Ins. Co. v. *Reals, 79 N. Y., 202*

American Water Works Co. v. *Venner, 45 N. Y. St. Rep., 441.*

Northern Pacific R. R. Co. v. *Kennon, 45 Fed. Rep., 517.*

Tracy v. Monnet Maryland, 20 Atl., 196.

Ericcson v. *First Natl. Bank* (*Neb.*), *28 L. R. A., 577.*

In *Fowler* v. *Palmer* (*62 N. Y., 533*), it was held that an action cannot be maintained to cancel a note and to restrain the bringing of a suit or from selling or disposing of a note on the ground that it has been paid.

To the same effect are the cases of *Town of Venice* v. *Woodruff* (*62 N. Y., 462, 467*), *Town of Springport* v. *Teutonia Savings Bank* (*75 N. Y., 397, 401*), and, finally, a case directly in point is that of the *N. Y. C. & H. R. R. R. Co.* v. *Reeves* (*41 Misc. Rep. N. Y., 490*), where Mr. Justice Lambert said:

"The plaintiff is a railroad corporation, having all of the rights, in so far as its corporate property is involved, that belong to any member of this state. It sells a non-transferabde ticket to John Doe, of the City of New York, good for one round trip from the initial point to Buffalo and return,

if used within a number of days. This ticket, it cannot be doubted, under the broad definition contained in sections 4 and 12 of the Statutory Construction Law, is personal property; the contract, such as it is, and entirely independent of the rights of the parties under it, belongs to the purchaser. He may use it for the purpose of securing the transportation which it promises in accord with the agreement, or he may frame it and hang it up in his home, or he may destroy it, or give it away, or he may sell it, and the plaintiff has no interest in the matter whatever. The ticket belongs absolutely to the purchaser, and while the rights of the parties under the contract may be limited, and the plaintiff, it may be, would be under no obligation to transport any one other than the original purchaser, the provision that the ticket is not transferable relates to the rights of the parties under the contract, and not to the written evidence of such contract; the ticket itself may be lawfully and properly transferred to any one, though the right to transportation may be limited to the purchaser under the provisions of the contract. The mere sale or purchase of the ticket does not concern the plaintiff in any degree; it has no interest in the ticket as such. All the right which it has is that which is expressed in the contract, and if the ticket is presented by any one other than the original purchaser, if the limitation is lawful and for a good consideration, the plaintiff may refuse to honor the same, and may collect full fare. Obviously, if the plaintiff may refuse to honor the ticket in the hands of a person other than the original purchaser, and may exact the full cash fare, it is not damaged by the transfer of the ticket, and the mere fact that it may be difficult for the plaintiff to know whether the person presenting the same is John Doe or Richard Roe is no good reason why a court of equity should interpose and surround each ticket as it is issued with the protection of an order of the Supreme Court, not because of any unlawful act of these defendants, but because some one unknown to this action may be tempted to make an improper use

of the same. In the somewhat analogous case of an action for the cancellation of written instruments it has been held that a resort to equity, to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law; or from some other special circumstances peculiar to the case, and rendering a resort to equity highly proper. And it is now well established that equity will not interpose to decree the cancellation of an instrument, the invalidity of which appears upon its face. Town of Venice *v.* Woodruff, 62 N. Y., 462, 467, and authorities there cited; Town of Springport *v.* Teutonia Savings Bank, 75 N. Y., 397-401. Assuming the limitation of these tickets to be lawful, the purchaser from one of these defendants gains no greater right in the ticket than possessed by the original purchaser, and that right was confined to his own personal transportation, and this appears upon the face of the ticket, the mere fact that the servants of the railroad company are unable to determine whether the person presenting the same is the original purchaser would not seem to warrant interference, more than in the case of non-negotiable instruments. By the terms of the contract the original purchaser is called upon to sign the return portion of the ticket in the presence of the plaintiff's agents, and this court will not presume that anyone not a party to this action will falsely impersonate another for the purpose of working fraud upon the plaintiff. The presumption of innocence belongs to every individual, and in the absence of facts justifying the inference, a court of equity will not assume that the traveling public, or any considerable portion of it, will engage in fraudulent transactions. The plaintiff, if it can establish the fraud, is entitled to take up the ticket and to charge full fare, according to the terms of the contract, and it cannot be held as a matter of law, under the allegations of its complaint, that it will be damaged with this remedy in its own hands."

IV.

The bill of complaint does not state a cause of action, either at law or in equity, against any of the defendants on the theory that they are instrumental in enabling the original purchaser of a ticket to dispose of it to another purchaser.

In *People ex rel. Fleischmann* v. *Caldwell* (*64 App. Div., 46; aff'd. 168 N. Y., 671*), it was held that a railroad ticket is property in the constitutional sense of the terms.

It was also decided in that case, as it had been in *People ex rel. Tyroler* v. *The Warden* (*157 N. Y., 116*), that the business of a ticket broker is legitimate, and that legislation seeking to prohibit it is a violation of the liberty of a citizen and violative of both the State and Federal Constitutions.

The opinion of Chief Judge Parker in the *Tyroler Case* is a convincing exposition of the utility and convenience of ticket brokerage, and a demonstration that it does not operate as a fraud upon railroad companies or an infraction upon any of their legal rights. It disapproves of the conclusions reached by Judge Clark in *Nashville, &c., R. R. Co.* v. *McConnell* (*82 Fed. Rep., 65*), upon which the complainant's cause of action here rests. It rejects as unsound the very basis on which Judge Clark's opinion rests, and without which the conclusion reached would not have been possible. The foundation of that opinion having been thus shaken by an adjudication of so high a character, the superstructure resting upon it must of necessity fall.

Stripped of all verbiage the complainant's argument is, that a ticket has been issued by it to A, which the latter, through the agency of the broker, has disposed of to B, who travels upon it over the complainant's lines instead of A. It is difficult to understand any legitimate theory on which the complainant can claim to have been legally injured by such an act. When it sold to A a round trip ticket from Chicago to New Orleans and return, it contracted to transport a passenger from Chicago to New Orleans, and from New Orleans to Chicago. So far as the difficulty of performing the task was concerned it was no greater if the person transported was named B than it would have been if he had been named A. The number of miles traveled would have been the same, the space occupied identical, the time required for transportation no different, the friction upon the rolling stock of no greater degree, in the one case than in the other. A acquired a contract which represented an obligation on the part of the railroad company, both legal and moral, in consideration of the amount of fare demanded and paid, to give a round trip to the passenger presenting the ticket.

So much for the practical aspects of the case. It is, however, claimed that the railroad company had the right to impose conditions upon its passengers. This is doubtless true. It had a right to limit the ticket as to time, and as to the train on which it was to be used; to require it to be stamped before being used; but inasmuch as the ticket is property it is insisted that it had no right to prohibit the sale and disposition thereof, because that would have been the equivalent of depriving the owner of the ticket of an essential attribute of the property which he had acquired.

But assuming that the company had a right to require A, the original purchaser, to identify himself at its office in New Orleans, and to endorse upon the ticket his signature as the means of identification, it by no means follows that the principal acts complained of in the bill constituted such a grievance as would give rise to a cause of action. The purchaser of the ticket had the right to give it away, to destroy it, to use it, and, as we claim, he could dispose of it. He also had the right to authorize another person to endorse his name on the ticket, and on disposing of his ticket before such endorsement he necessarily gave implied authority to the purchaser to endorse his name if he desired to make use of the ticket. Certainly such a signature is not and cannot be a forgery; it was either expressly or impliedly authorized just as any man may give authority to another to sign or endorse his name to a check, note or draft. Such signature being authorized, although not the name of the party affixing it, is not a forgery within the purview of any penal law.

This has been expressly decided by the Supreme Court of New York.

Whatever might be the legal right of the transferee of such a ticket to travel upon it, that is not the question here presented. It is simply, whether or not a broker who buys such a ticket from an original purchaser and disposes of it to another, is liable to the complainant in any form of action.

We insist that this state of facts does not give rise to a cause of action against the broker. He had a right to buy the ticket from the original purchaser. He had the right to sell it to another. He is not accountable for what that other person may have done with the ticket. He had the right to act as the medium in the transaction of business

between the original purchaser and the second purchaser, without subjecting himself to any liability. There must be some well-established principle of law on which such liability depends. It is certainly not within the domain of the law of contracts, for there is no privity between the railroad company and the broker; there is no contractual obligation which the latter has assumed or performed.

On what theory of tort would a cause of action against the broker rest? It is claimed that the broker has enabled the original purchaser to commit a breach of his contract, and puts it into the power of the second purchaser to use the ticket in violation of a contract between the original purchaser and the railroad company. It is, however, difficult to see in what respect the act of the broker constitutes a tort or breach of duty owing by him to the railroad company. He certainly occupies no relation involving a trust; nor is there any statutory duty, or one of a kindred nature that he owes to the railroad company. As well might it be said that the owner of a newspaper is liable for the frauds of an advertiser, because the newspaper is an agency by which the advertiser reaches the public in general, or that the vendor of a revolver is liable for the use made of it.

In the great case of *Allen v. Flood* (*L. D. 1 App. Cas., 1898, 1*), the House of Lords decided in 1898, that an action will not lie in favor of one who has been discharged from his employment against persons who insisted, even maliciously, that his employer should discharge him. In other words, such an act, although almost identical in character with that which is here complained of, was held to be *damnum sine injuria.* Here we contend there is no legitimate ground for even claiming that legal

damage could result from the act of the broker. The opinions in that case present an admirable philosophical discussion of the basic theory of an action in tort, and it is confidently believed that as a result of a consideration of them the acts here complained of will not be considered sufficient to give rise to any cause of action against the defendants.

This reasoning has received the approval of Mr. Justice Lambert in *N. Y. C. & H. R. R. R. Co.* v. *Reeves* (*supra*).

V.

There was an improper joinder of defendants and of independent causes of action. The bill is multifarious and the case does not fall within the rule concerning multiplicity of suits.

But for the decision in *Nashville, etc. Ry. Co, vs. McConnell*, 82 Fed. Rep., 72, and the cases following the present action would present a most novel and startling attempt to extend the equity powers of the Federal courts. Seven separate and independent defendants, each liable, if at all, upon a separate and independent cause of action, with each cause of action founded upon distinct acts of the several defendants, are brought together in an omnibus bill and sought to be enjoined from doing various acts of the most widely divergent character.

The ground of jurisdiction asserted by the complainant is the alleged inadequacy of its remedy at law, and an appeal to the familiar rules against multiplicity of suits. The alleged inadequacy of the complainant's legal remedy proceeds upon its inability to detect the various frauds which some of the defendants are claimed to be practising upon it. In other words, the complainant asks the court to transform itself into an inquisition to ascertain against which of the defendants it has a cause of action, and what its cause of action against such defendants may be.

We presume that if, while one of the complainant's trains was passing through the city, some irresponsible citizen should break a window of one of the cars, the complainant would be equally without means of determining who had committed the wrong; but we do not understand that this court would take jurisdiction of an action against the entire population of New Orleans to enable complainant to locate the responsibility.

Or, to make the case more analogous, if some of the citizens of New Orleans, some by doing mob violence to the incoming trains of the complainant; others by circulating slanderous rumors as to the safety of its transportation facilities, and still others by acts such as are set forth in the bill of complaint, should interfere with the complainant's traffic to and from that city, it is not very probable that equity would assume jurisdiction either because these various wrongs had in common the diminution of complainant's profits, or because its brakemen or conductors were unable to supply information to enable complainant to institute the necessary action for damages.

A careful analysis of the bill of complaint indicates that its gravamen rests upon the theory

that seven different individuals, engaged in seven separate and independent undertakings, having no relation of partners to one another, not united by the bonds of being stockholders in a common corporation, are engaged in perpetuating separate and independent wrongs upon the complainant. This certainly does not warrant the joinder of all of these alleged wrongdoers as defendants in a single action. There are seven independent causes of action against as many individuals, but they are as distinct as though each of the seven defendants had been bound by a separate contract obligation to the same individual. It could not be pretended for a moment that one action could be brought for the purpose of enforcing these seven independent obligations.

In like manner, six different individuals might on the same day commit an assault and battery upon one person. The mere fact that six assaults had taken place and that the party wronged has in each instance been the same does not warrant the joinder of the six defendants in a single suit, unless they all united in one and the same assault.

The basis of the complainant's claim for relief is that the several ticket brokers have been guilty of a tort by inducing the original purchasers of tickets to violate their contracts, and of enabling the subsequent purchaser to become substituted for the original purchaser. If this means anything it is that the ticket broker who has participated in such an act has committed a tort which might be made the basis of an action at law. The fact that the torts are numerous does not, however, give rise to equity jurisdiction any more than the fact that a debtor has incurred numerous obligations in the form of promissory notes, or

that a newspaper has been guilty of publishing numerous libels against a certain individual.

Whatever might, however, be said respecting the right of the complainant to bring a suit in equity against a single broker to restrain the perpetration by him of a series of wrongful acts, it is an entirely different proposition to assert that a suit in equity may be brought against seven different individuals, each of whom, independently of all the others, performs a series of wrongful acts of a similar nature to that which is committed by the others proceeded against.

As well might it be claimed that if all the newspapers in the United States should publish a series of articles against a candidate for office, which are libellous in their nature and similar in kind, that he might come into a court of equity and, joining them all as defendants, seek injunctive relief against them in a single suit. Each defendant has a right to interpose such defenses as he has, unhampered and unembarrassed by the defense or lack of defense which other of the parties proceeded against might have. A may be able to show that he has not perpetrated any of the acts complained of; B that he has acted under authority and license from the complainant; C that he has a release—and so on.

The very theory which underlies the well-established rules of procedure which prohibit the improper joinder of causes of action, namely, that each defendant should have the right to litigate with respect to such matters only in which he is concerned and without unnecessary expense by reason of the aggregation of issues to which he bears no relation, exists in the present case.

There has been much confusion in the use of the phrase, that equity acquires jurisdiction in order

to avoid a multiplicity of suits. Equity never interferes to save the plaintiff from the labor and expense of pursuing distinct legal causes of action against different defendants. The doctrine exists for the protection of defendants who otherwise would be exposed to numerous actions arising out of the same general matter from plaintiffs having a community of adverse interests, or from plaintiffs whose rights in common in a fund would be impaired or complicated from numerous plaintiffs pursuing the same defendant or the same fund. In other words, a multiplicity of plaintiffs in separate actions against the same defendants may be ground for interposition for the purpose of saving a multiplicity of suits. But a multiplicity of defendants against whom a single plaintiff seeks relief with respect to the commission of tortious acts, has never been held by any authoritative decision as a ground for proceeding in equity.

The above grounds for equity jurisdiction are well stated by the following authorities:

Pfohl *v.* Simpson, 74 N. Y., 142.
Boughton *v.* City of Brooklyn, 15 Barb., 375.
2 Story Eq. Jur. §§853, 854.
Tribette *v.* Railroad Co., 70 Misc., 182.

In Pfohl *v.* Simpson (*supra*) Folger, J. says:

"It is in cases where many persons have claims and are prosecuting or about to prosecute them at law against one defendant or against a class of defendants or against a fund liable in equal degree to all those persons and to others, and thus there arises the fact of the probability of a multi-

plicity of actions, that this jurisdiction of equity attaches."

In Boughton *v.* City of Brooklyn (*supra*) Strong, J. says:

"That the practice of equity interposing to prevent a multiplicity of suits was originally introduced for the protection of any one who might be threatened with the attacks of numerous litigants having in common claims against him *based upon the same facts* and priuciples." * * *

"It will be seen in these actions that there is a common right to be asserted or maintained in which numbers either on the one side or the other or upon both sides have a common interest, or there must have been repeated attempts to litigate the same questions as in the old action of ejectment where the verdicts and judgments did not conclude the parties. These opinions are commended as 'elaborate and learned examinations of the jurisdiction of the court in preventing a multiplicity of suits' in Howell v. City of Buffalo, 2 N. Y. Court of Appeals Decisions, 412."

In Tribette *v.* Railroad Co. (*supra*) the learned Judge writing the opinion says:

"The cases establish this proposition, namely: Where each of several may proceed or be proceeded against in equity, their joinder as plaintiffs or defendants in one suit is not objectionable. But this is a very different question from that whether, merely because many actions at law arise out of the same transaction or grounds and depend upon the same matters of fact and law, that all may proceed or be proceeded against jointly in one suit in chancery, and it is believed that it has never been so held and never will be in cases like those here involved. Where each of the parties may proceed in equity separately they are permitted to unite and make common interest against a common adversary, and one may

implead or be impleaded in one suit many who are his adversaries in a matter common to all in many cases, but never when the only ground of relief sought is that the adversaries are numerous and the suits are for that not in itself a matter of equity cognizance" (p. 187).

Again the court says, p. 191:

"If preventing multiplicity of suits is such a good thing as to justify bringing into one suit all who are interested in the same questions of law and fact, it is needful that its benefit should be extended to all cases where it can be applied, and not restricted in its beneficent operation. It should have full sway in all classes of cases. The sole object, we are told, of the doctrine is to prevent multiplicity of suits by uniting all who have a common interest in the same question in one suit, and it is quite as important to effect this in one class of cases as another, and as actions against railroad companies are quite numerous, it is of especial concern to prevent multiplicity in this class of cases. Therefore, if the doctrine advanced were sound it would have to be applied wherever the conditions prescribed exist; that is, wherever many are interested in the same question of fact and law. That this is inadmissible must be apparent."

This principle has been applied in Dykman *v.* Keeney (154 N. Y., 453, and in the case of O'Brien *v.* Fitzgerald (150 N. Y., 572), and Empire State Savings Bank of Buffalo *v.* Beard (151 N. Y., 638) therein referred to.

There is no such common question of privity of interest among the defendants as will authorize the maintenance of one single action against them on the theory of a bill of peace.

The latest discussion of the principles of equity jurisdiction of the theory of a bill of peace is found in *Hale* v. *Allinson* (*188 U. S., 56*). It was

there held that a single action in equity cannot be maintained by the receiver of an insolvent corporation against the various stockholders to enforce their statutory liability on the ground that such single action would prevent a multiplicity of suits. Mr. Justice Peckham gives an elaborate review of the authorities, beginning with the case of *Mayor of York v. Pilkington* (*1 Atk., 282,* decided in 1837). He concludes by quoting the language of Judge McPherson in the court below (*102 Fed. Rep., 790*) in dealing with the question before the court as to the receiver's right to maintain the action against the stockholders.

The following is a portion of Judge McPherson's opinion quoted by Judge Peckham:

"Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defence, and defences may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defences are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability. Suppose A to averr that his signature to the subscription list was a forgery; what connection has that averment to B's contention, that his subscription was made by an agent

who had exceeded his powers? or with C's defence, that his subscription was obtained by fraudulent representations? or with D's defence, that he has discharged his full liability by a voluntary payment to the receiver himself? or with E's defence, that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defences, having nothing in common; and upon each, the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional right. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law."

"We are in accord with the views thus expressed," said Mr. Justice Peckham, "and we therefore must deny the jurisdiction of equity so far as it is based upon the asserted prevention of a multiplicity of suits."

In *Marsh v. Kaye* (*168 N. Y., 196*) it was held that an action could not be maintained in equity by one creditor on behalf of himself and others to enforce the liability of directors of a charitable organization on the theory that the corporation being insolvent and in the hands of a receiver a multiplicity of suits would be prevented. The court rested its decision on the previous decisions in *O'Brien v. Fitzgerald, 143 N. Y., 377; Empire*

State Savings Bank v. Board, 151 N. Y., 638; Dykman v. Keeney, 154 N. Y., 483.

In *Dykman v. Keeney* (*supra*) Mr. Justice Gray uses the following language:

"It is very clear therefore that we are committed by our decision in O'Brien *v.* Fitzgerald, to the view that where the action is to hold persons responsible to the receiver of a corporation for a neglectful and wrongful performance of their duties as directors and to recover the losses sustained by the corporation, the action is one at law and that something more is required to warrant the intervention of a court of equity than mere allegations showing that the acts complained of are numerous and complicated; that they are difficult of ascertainment, without a discovery with respect to them, and that a multiplicity of actions would be necessary, if all the directors, who were in office during the whole or a part of the time within which the acts complained of were committed, could not be associated as defendants in one action."

In *Washington County v. Williams* (*111 Fed. Rep., 801;* C. C. A. 8th Cir.) a county issued a series of bonds payable to bearer, in which it promised to pay thereon *pro rata* the proceeds of an annual tax to be levied at a certain rate upon the taxable property of the county until the principal and interest should be paid. It was held that each holder of such bonds had a separate right of action at law to recover such sum as should be due him under the terms of the bond, and that the several bondholders could not unite and jointly maintain a suit in equity for a decree establishing the validity of the bonds and a recovery of the amount due thereon on the repudiation of the obligations by the county, and that the bondholders' remedy at law was adequate and

equity did not have jurisdiction of such case on the ground of a multiplicity of suits.

Other illustrations which bear on this branch of the case are afforded by the following authorities:

In *Scott v. McFarland* (*70 Fed. Rep., 280;* Circuit Court, District of Oregon) a bill alleged that complainant, by fraudulent representations and without consideration, was induced by a person named to execute in his favor five promissory notes; that thereafter the payee forged complainant's name to a large number of other notes like those signed by the complainant; that the defendants, fifteen in number, were severally holders of these notes, claiming to have purchased them in good faith in the usual course of business; that complainant was unable without inspection of the notes to ascertain which were the five signed by him, and which were forgeries; that a discovery was necessary for that purpose, and that the persons holding the five notes acquired them with notice of their fraudulent character. The bill prayed a cancellation of all the notes.

It was held that the case made out was not one in which equity jurisdiction could be sustained on the ground of preventing a multiplicity of suits, as there was no community of interest among the several defendants. Bellinger, J., said:

"Suits do not become of equitable cognizance merely because of their number. Equity assumes jurisdiction to prevent a multiplicity of suits where, among other cases, individual claims, not only legally separate and distinct transactions, are made against a single plaintiff; but in all such cases there must at least be a community of interest among all the claimants in the question at issue and in the remedy. The case of Louisville N. A. & C. Ry. Co. *v.* Ohio Valley Improvement &

Contract. Co., 57 Fed., 42, is relied upon to sustain the jurisdiction in this case. That is a case where there was an illegal and fraudulent guaranty of several hundred bonds of a railroad company, which the complainant sought to have canceled. The guaranty was endorsed upon all of these bonds. These guaranties were in pursuance of a certain contract between the complainant and defendant company, the facts alleged being such as to render the guaranties made and the contract therefor illegal. The case involved a question or questions decisive of the validity of all the guaranties. There was therefore a community of interests among all the claimants. The case of Railroad Co. *v.* Schuyler, 17 N. Y., 592, is of the same character. The case was one of spurious certificates of stock, issued by an officer having apparent authority to do so, and outstanding in the hands of numerous holders. The bill was maintained upon the ground that the false certificates had a common ground of invalidity and so of all like cases where the jurisdiction is upheld to set aside distinct claims in separate hands held under distinct circumstances—there must be a common ground of invalidity. It is not enough that the grounds of the invalidity of the several instruments are, as in this case, similar. So far as the instruments sought to be canceled here, as forged, are concerned, the forgeries are several. The ground of the invalidity of these notes is not a common one within the sense of the cases cited. The character of one of these notes, as to its being forged, has no bearing as to the others. The questions touching the validity of these notes are as several as the holdings. There is, in other words, a multiplicity of issues of fact to be tried, which the jurisdiction invoked cannot avoid or lessen. Moreover, the validity of a portion of these notes is attacked upon the ground that they are without consideration, and that their holders took with notice. The questions here are not only distinct, but different in character from the forgeries charged as to the remaining notes; and, further, the right to recover upon these notes depends en-

tirely upon the good faith of the several holders, and it is not claimed that any community of interest exists between the several holders as to this. The demurrer to the bill of complaint is sustained."

To repeat, our position is that in this case there is not only an improper joinder of parties, but also of causes of action, and that there is no such connection between the parties as warrants such a union in a single suit any more than though the tortious act which is complained of had been any of the ordinary wrongs for relief against which resort is had to the courts.

It has been suggested that the decision in *Nashville Railroad Co.* v. *McConnell* (*82 Fed. Rep., 65*) is an authority for such a joinder of defendants and of causes of action. But a reference to page 72 of the opinion shows that that proposition was not considered, but was conceded away by counsel who were over-confident as to other propositions which they discussed. Judge Clark said:

"It is agreed in order to save a larger accumulation of costs, that if the court entertains the opinion that there is jurisdiction against each defendant in a separate suit, no objection will be urged against entertaining suits against the defendants jointly."

It has further been suggested that actions in equity have been maintained by employers against their discharged employees who are united together for the purpose of maintaining a boycott or unlawful combination to the injury of the complainant. Those cases are entirely different from the present. There, all of the defendants are united together for the purpose of jointly perpetrating an injury against the complainants and

their property. The very gist of the complaint is that the defendants are by a concerted and combined action, together committing a tortious act.

Here, there is no combination, no concert of action. Each defendant is acting on his own hook, *in competition with every other defendant*, performing disjuncted acts having no relation to any acts, however similar in character they may be, performed by any of the other defendants.

In the one case the act complained of is the same as though six persons together commit an assault and battery upon A. In the other it is the same as though six different individuals, at different times and at different places, committed six different assaults upon A.

The mere fact that there are allegations in the complaint that the defendants are conspiring together, is of no consequence. Allegations do not count. The facts must be proved, and such facts as are alleged belie the conclusion of a conspiracy. The fact that the acts complained of are similar does not make it a conspiracy. Combinations must be proven by competent evidence, and identity of procedure falls far short of proof of conspiracy. As was said by Chief Justice Fuller in *Kent* v. *Lake Superior Canal Co.* (*144 U. S., 91*): "Epithets do not make out fraud, and the averments are substantially of legal conclusions not admitted by the demurrers."

The opinion of Mr. Justice Lambert in *N. Y. C. & H. R. R. R. Co.* v. *Reeves*, already several times referred to, is very clear on this proposition.

VI.

The Circuit Court was without jurisdiction, notwithstanding the colorable averments contained in the bill that the injury sustained in consequence of the defendants' acts exceeded two thousand dollars, there being no foundation in fact in support of such averment.

Whatever the allegations of the bill may be, whenever it appears that the suit did not really and substantially involve a dispute or controversy within the jurisdiction of the United States Circuit Court, the Court will *sua sponte* dismiss the proceeding.

Williams v. Nottowa, 104 U. S. 209, 211.
Railway Co. v. *Swan, 111 U. S. 372, 382.*
Morris v. *Gilmer, 129 U. S. 325.*
King Bridge Co. v. *Otoe County, 120 U. S., 225.*
Farmington v. *Pilsbury, 114 U. S. 144.*
Nashua Railroad v. *Lowell Railroad, 136 U. S. 373.*
Anderson v. *Watt, 138 U. S. 701.*
Excelsior W. P. Co. v. *Pacific Bridge Co., 185 U. S. 287.*

The alleged injury to the complainant's business will, on analysis, be found to be merely a colorable claim for the purpose of securing jurisdiction in the Federal Courts.

The relief demanded is general against the trafficking by defendants in all non-transferable tickets. Not tickets presently in existence; not tickets actually in use; but the assertion is boldly made that the Railroad Company demands protection under a threat to abandon in the future all excursion tickets for conventions which may or may not be held in the future unless the relief sought is accorded it. Protection is sought against trafficking in what has been denominated as winter excursion tickets not in *esse* and which may never be issued; for reduced rate tickets which the railroads may in the future see fit to issue; and finally, for all tickets which bear the impress of the complaint of non-transferability, whether for excursions, conventions, winter traffic, or for any other purpose. They even make bold to assert that the defendants will in the future commit crime and conspire to defraud complainants of their property by means of forgery and false representations, unless the blanket injunction applied for is granted.

It is fundamental that equity acts only where property rights are involved or threatened. There must be an actual existing tangible *res*. There must be something of which the plaintiff is deprived or has been deprived, or of which he is threatened to be deprived. The complainant does not indicate from the Record, a specific piece of property actually in existence, for which the protection of a court of equity is sought. It is asking for the protection of a business not in *esse*, but to arise in the future, and which the court will not presume will be attacked injuriously before it comes into existence.

We submit that the jurisdictional averment embodied in the bill is so manifestly fictitious as to

make it legally certain that the amount of injury which it is alleged the complainant's business would suffer in consequence of defendants' trafficking in non-transferable tickets is simply a jurisdictional averment for the purpose of establishing a case for this Court, and being on its face apparently colorable, the trial court should have stayed the case, and, under the Act of 1875, dismissed the proceedings.

In *Bank of Arapahoe* vs. *David Bradley Co., 72 Fed. Rep., 867,* Mr. Justice Caldwell said:

"But jurisdiction is not acquired by a groundless and fictitious claim, made for the sole purpose of conferring it. The jurisdiction is determined by the amount demanded by the plaintiff in good faith, and not by the damages claimed, either in the body of the complaint or in the prayer for judgment. In Bowman *v.* Railway Co., 115 U. S., 611, 613, 6 Sup. Ct., 192, Chief Justice Waite, speaking for the Court, said: 'Upon the face of this *record* it is apparent that the actual value of the matter in dispute is not sufficient to give us jurisdiction. It is now well settled that our jurisdiction in an action upon a money demand is governed by the value of the actual matter in dispute in this Court, *as shown by the whole record,* and not by the *damages claimed,* or the prayer for judgment. * * * As was said in Hilton *v.* Dickinson, 2 Sup. Ct., 424: 'It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction; but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail.' * * *

"The fifth section of the Judiciary Act of March 3rd, 1875 (18 St., 470), was leveled especially at this abuse, and put an end to all such frauds on the jurisdiction of the Circuit Court by providing: 'That if, in any suit commenced in a Circuit Court

* * * it shall appear to the satisfaction of said Circuit Court, at any time after said suit has been brought * * * *that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court,* the said Circuit Court shall proceed no further therein, but shall dismiss the suit.' * * *

"It will be observed that this Act is *mandatory* in its terms, and *makes it the absolute duty* of the circuit court to dismiss a suit whenever, in the progress of the case, it appears that it does not really and substantially involve a dispute or controversy within the jurisdiction of the circuit court. In Williams *v.* Nottowa, T. P., 104 U. S., 209, Chief Justice Waite, speaking for the Court, says: 'This provision of the Act of 1875 is a salutary one, and it is the duty of the circuit courts to exercise their power under it in proper cases.'

"See, to same effect Maxwell *v.* Railroad Co., 34 Fed., 286; Froelisch *v.* Express Co., 67 N. C., 1.

"Groundless and fictitious claims, obviously set up for the purpose of swelling the plaintiffs' claim, on the face of the complaint, to an amount within the jurisdiction of the circuit court, under the Act of 1875, utterly fails of their purpose. The plaintiffs' claim, as far as relates to the amount required to give jurisdiction to the circuit Court under this act, *must be made in good faith.*

"In determining whether a claim is made in good faith, or is fictitious, and made only for imposing on the court a case not properly within its jurisdiction, the plaintiff will be held to a knowledge of the well-settled rules of law; and when the actual matter in controversy is inadequate in value to confer the jurisdiction, and the additional amount required for that purpose is attempted to be supplied by setting up a claim for something easily susceptible of proof, if made in good faith, but in support of which no proof is offered and no satisfactory explanation given, or by adding a claim for which the law gives no right of action, and for which there can be no recovery, such a claim must be held to be fictitious, and to

have been made for the purpose of perpetrating a fraud on the jurisdiction of the court.''

There is nothing in the record tending to show that the defendants handled or disposed of any of the complainant's tickets, non-transferable or otherwise, during the period of time that the U. C. V.'s were holding their annual meetings in New Orleans, or during the period covered by the Mardi Gras festivities in 1904; and yet complainant obtained not only its temporary writ, but succeeded, upon final hearing, to have it made perpetual, carrying with the decree the burden of the costs incident to the hearing and determination of what was, at the date of the final hearing, a moot question. How would it have been possible for the complainant to have sustained any injury without having at its command proof to establish the fact? If tickets non-transferable, were disposed of by defendants and tendered for transportation, the fact would have been known to the agents and representatives of the plaintiff corporation, who would at once have taken them up and demanded the payment of full fare. No proof of such a fact was attempted.

The reasoning under Point IV indicates that the complainant could not have sustained any legal damage by the acts complained of in the bill.

It is further to be remembered in this connection, that there is no allegation in the bill of complaint, that the complainant has sustained damage to the extent of the jurisdictional amount as a result of the acts of any one of the defendants. It is merely pretended, that by the acts of the defendants conjoined, such damage has resulted.

In view of the argument under Point V, it is evident that in order to confer jurisdiction, it must

appear that an independent cause of action, of which the United States Circuit Court had jurisdiction both by reason of the diversity of citizenship of the parties and of the amount involved, should have been stated as against each of the defendants, each being engaged in an independent enterprise, and that it is not sufficient to show that the injury sustained by the plaintiff as a result of the aggregated acts of ten, fifty or a hundred ticket-brokers equaled the jurisdictional amount.

VII.

It is respectfully submitted that the petition for a writ of certiorari should be granted as prayed for.

Louis Marshall,
Henry L. Lazarus,
Moritz Rosenthal,
Petitioners' Counsel.

No. 294

Supreme Court of the United States

OCTOBER TERM, 1905.

IN THE MATTER OF THE PETITION OF

MARCUS K. BITTERMAN, JULIUS MEHLIG AND CHARLES T. KELSO.

For a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit.

IN THE CASE OF

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Appellant,

VERSUS

MARCUS K. BITTERMAN *ET ALS.*,

Appellees.

BRIEF ON BEHALF OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO SAID PETITION.

GEORGE DENEGRE,

JOSEPH PAXTON BLAIR,

Solicitors for Louisville & Nashville Railroad Company, Respondent.

J. O. Hauser, "The Legal Printer," 403 Camp St., New Orleans.

Supreme Court of the United States

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BRIEF ON BEHALF OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO SAID PETITION.

I.—AS TO THE JURISDICTION.

The ground of the attack upon the jurisdiction is that the amount involved is less than Two Thousand Dollars. This objection to the jurisdiction was not presented by a formal plea of abatement. By filing

a general demurrer and answer to the bill and by waiting until after the replication and taking of evidence, before offering to file such a plea, defendants lost or waived the right to urge any defect in the jurisdiction by means of a formal plea in abatement, which must be filed *in limine*. They did not at any time make, or offer to make, such a showing as would require or justify the Court under Section 5 of the Act of March, 1875, to suspend proceedings and direct an investigation to ascertain whether its jurisdiction was being imposed upon. They did not and could not bring any fact to the attention of the Court, by reference to the record or the evidence, or to affidavits, to justify the belief or create a suspicion that the suit had no business in the Federal Court.

The case then is one in which an objection to the jurisdiction on account of the amount involved is raised by a denial in the answer of the jurisdictional averments of the bill. It is well settled that, when objection is made in this way, the burden of proof rests upon defendant. If the proper jurisdictional averments appear in the bill, in the absence of proof to the contrary, the jurisdiction will be maintained.

Butchers and Drovers' Stock Yards Co. vs. L. & N. R. R. Co., C. C. A. 67, F. R. 35, 40.
Pine vs. Mayor, etc., 103 F. R. 337.
Adams vs. Shirk et al., 117 F. R. 801.
Moffet vs. Quime, 95 F. R. 199.
Penn. Co. vs. Lay, 138 F. R. 203.
1 Foster's Fed. Prac., S 16, pp. 56-57.

A suit cannot properly be dismissed by a Circuit Court as not substantially involving a controversy within its

jurisdiction, unless the facts made to appear on the record create a legal certainty of that conclusion.

Wetmore vs. Rymer, 169 U. S. 115.
Barry vs. Edmonds, 116 U. S. 550.
Adams vs. Shirk et al., 117 F. R. 801.

In cases of this character, the value of the business to be protected determines the amount involved.

Texas & Pacific Railway Co. vs. Kutman (C. C. A.) 54 F. R. 548, 552.
Scott vs. Donald, 165 U. S. 107.
Southern Express Co. vs. Mayor, etc., 116 F. R. 756.
Railroad Co. vs. McConnell, 82 F. R. 65.

The averments of the bill, moreover, in connection with the admissions in the answer, and the evidence offered by complainant, clearly and affirmatively establish an amount exceeding two thousand dollars.

II.—On the Merits.

The interposition of this Court cannot be invoked on the ground of any want of uniformity in the decisions of the Federal Courts on the questions involved. The right of a railroad company to similar injunctive relief against ticket scalpers has been uniformly recognized by the various Circuit Courts of the United States.

Nashville R. R. Co. vs. McConnell, 82 F. R. 65.
Delaware, etc., R. Co. vs. Frank, 110 F. R. 689.
Kinner vs. Lake Shore & M. S. R. R., 69 N. E. 614.
Illinois Central R. R. Co. vs. Caffery, 128 F. R. 770.
Pennsylvania R. R. Co. vs. Beekman, 30 Wash. L. R. 715.
Schubach vs. McDonald, 78 S. W. 1020.
Pennsylvania R. R. Co. vs. Bay, 138 F. R. 203.

Nor does there exist any conflict between the decisions of the State and Federal Courts. The case of *People ex rel. Tyroler vs. Warden*, 157 N. Y. 116, involving, as it does, questions radically differing from those presented in the cited cases, cannot be considered as in conflict therewith. However, the views expressed in the opinion in that case respecting the ticket-brokerage business, etc., have not only not been followed by any other court, but they have been rejected and disapproved by the Supreme Courts of the various States in deciding similar cases. See

Allardt vs. People, 197 Ill. 508 (1902).
Gannin vs. State, 51 S. W. (Texas) 1126.
In re O'Neil (Wash., Dec. 1905), 83 Pac. Rep. 104, 107.
State of Oregon vs. Thompson, decided by the Supreme Court of Oregon, February, 1906, and authorities therein cited.

Under *In re Passenger Tariffs and Rate Wars*, 2 Interstate Commerce Reports 127, the Interstate Commerce Commission exposes the evils in the ticket brokerage business; and, again, in its Third Annual Report, page 311, and in the Fourth Interstate Commerce Reports, pages 289 and 397, attention is again called to the essentially wrongful nature of the business and a report given of a widespread investigation made by the Commission. In the opinions rendered in the cases above referred to, wherein the Federal Courts have enjoined the scalping of non-transferable tickets, and in the cases cited from the State Courts, where legislation directed against ticket scalping has been sustained, will be found a similar de-

nunciation of the methods and purposes of ticket scalping. In order to carry on his second-hand goods business a ticket broker or scalper must play the part of a "fence," buying from those who act dishonestly in selling, and selling to those who act dishonestly in making use of what has been sold to them. He can thrive and make a profit only by dealing in non-transferable tickets, which are issued at less than regular rates. Other tickets can be purchased over the counters of the railroad companies at regular rates, and unused portions can be redeemed at the office of the issuing company. Special reduced rate tickets, where the sum of the locals exceeds the round trip reduced rate made by the railroad company, are the tickets which the scalper can handle with profit. That fraud and deception are necessarily involved in the purchase and sale of such tickets is manifest. There seems to be a universal concensus of judicial opinion that the ticket brokerage business is essentially based on fraud and deception.

In the very limited time allowed for the preparation of this brief, it has not been possible, and it is not deemed necessary, to present an argument covering all the points involved. We ask leave to refer the Court to the cases of *Schuback vs. McDonald*, 78 S. W. Reporter 1020 (Missouri), and *Illinois Central R. R. Co. vs. Caffery*, 128 Federal Reporter 770, for a statement of the reasons which have led the Court to protect the business threatened through ticket scalping by an injunction covering future issues of non-transferable tickets. If complainant

were required to institute a separate suit to prevent the scalping of each issue of a non-transferable ticket, issued either by itself or by other railroads for use over its lines, it would have to bring suits almost daily, and would be involved in about as great a multiplicity of suits as if it were denied any equitable relief and required to bring a separate suit for damages on every occasion of the sale of any such tickets.

Respectfully submitted,

GEORGE DENEGRE,

JOSEPH PAXTON BLAIR,

Solicitors for Louisville & Nashville Railroad Company, Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1905.

[redacted]

[redacted]

APR 5 1906

JAMES H. McKENNEY,

MARCUS K. BITTERMAN, JULIUS MERLIG and CHARLES T. KELSKO,

Petitioners,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONERS' POINTS.

LOUIS MARSHALL,
HENRY L. LAZARUS,
MORITZ ROSENTHAL,
Petitioners' Counsel.

E. H. TRIMBEL, PRINTER, 204-206 FULTON STREET, NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1906.

MARCUS K. BITTERMAN, JULIUS MEHLIG and CHARLES T. KELSKO,

Petitioners,

against

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

No. 294.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners' Points.

On May 9, 1903, the Louisville & Nashville Railway Company filed its bill of complaint against the petitioners, in the United States Circuit Court for the Eastern District of Louisiana, for an injunction to restrain them from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets or the return coupons or unused portions thereof issued by the complainant or by any other railroad company for use over the complainant's lines of railway or any part of them which by the terms thereof are not transferable, or from soliciting, advertising, encour-

aging or procuring any person other than the original purchaser of such tickets to use or attempt to use said tickets for passage on any train or trains of the complainant, especially including the non-transferable round trip tickets issued for use on the occasion of the United Confederate Veterans' Reunion at New Orleans in May, 1903 (Rec., pp. 2-10).

The Bill of Complaint.

The bill alleged that the petitioners were ticket brokers engaged in the business of buying and selling unused portions of railroad passenger tickets, especially those tickets in the nature of excursion or special rate tickets issued on occasions of fairs, expositions, conventions and the like; that they were "joined herein because their business and transactions complained of are in act, purpose and effect identical, and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them" (Rec., p. 3).

The third paragraph alleges that the United Confederate Veterans are accustomed to hold annually a convention or reunion, and that in April, 1902, they were invited to hold their next meeting at New Orleans, which invitation they had accepted, the reunion to extend from May 19th to May 22nd, 1903; "that the people of this city and State are interested in the success of such reunion, not only from sentimental and patriotic motives, but by reason of the material benefits which will result from a large attendance thereat" (Rec., pp. 3, 4).

In the fourth paragraph there are allegations as to the arrangements made for procuring a large attendance at the reunion, and proceeds:

"That a large proportion of the said veterans and others who usually attend said reunions are people of limited means who would not be able to come to said reunion if they had to pay the regular rates for the transportation of passengers on the railroads leading to New Orleans; that it was accordingly deemed by said committee to be essential, and it was in fact essential, to the success of said reunion and to secure a large attendance thereat for the various railway companies and their connections entering New Orleans to issue round trip tickets for the transportation of people to said reunion, and return at rates very much below the regular lawful and reasonable rates customarily charged by them" (Rec., p. 4).

The fifth paragraph alleges that the complainant agreed to make such special rates and extensively advertised the fact; and provided a form of ticket for the use of those desiring to attend the reunion from places on its line of railway, which declared "on its face that it is a non-transferable reduced rate ticket 'issued account of U. C. V. Reunion, 1903,' good subject to the conditions printed thereon for one first class passage to New Orleans and return, the going trip to begin on the date of sale and the return trip to begin leaving New Orleans not later than May 24th, 1903, and it also provides for an extension of the final leaving date on the application of the original purchaser; that among the conditions on the face of said ticket, which ticket contract is signed by the original purchaser is one, that said ticket is non-transferable and if presented by any other than the original purchaser, who is required to sign the same at the date of purchase, it will not be honored but will be forfeited, and any agent or conductor of any of the lines over which it reads shall have the right to take up and cancel the

entire ticket, both going and return portions" (Rec., p. 5).

The seventh paragraph alleges that the attendance upon the reunion will be very large, and that over 100,000 people will be transported to the meeting upon various railroads terminating in the city, of which number fully one-fourth will travel over the complainant's lines of railway and make use of the round trip non-transferable U. C. V. Reunion ticket; "that the large number of people to be carried by orator on the occasion of said reunion has rendered it necessary for it to issue a ticket the return portion of which will not have to be signed by the original purchasers, as it will be impracticable to secure such signatures in time to enable the owners thereof to depart when desired, and the same would be a great inconvenience and source of annoyance and expense to the people for whose benefit such tickets are to be issued; that, also, by reason of the large number of persons to be carried on said occasion, it is wholly impracticable to have the return portion of said ticket presented to any agent of orator in this city, where the identification of the original purchaser can be properly made, and that it is equally impracticable for the train conductor or collector while in the management of his train and in charge of so many passengers thereon, to identify properly the persons presenting return portions of said tickets, and at the same time give proper care and attention to the safety and welfare of such passengers and the operation of said train" (Rec., p. 5).

The ninth paragraph alleges that the defendants and each of them are engaged in the business of buying and selling the unused portions of railroad tickets, for the express purpose, and no other, of putting them in the hands of purchasers who

will use the same to secure passage on the complainant's or other railroads, and thus by fraud and imposition, deceive, impose upon and defraud the railroad companies (Rec., p. 6); "and that the defendants will, unless restrained by this Honorable Court, buy and sell the return portions of said United Confederate Veterans' Reunion tickets, soliciting, persuading and inducing the holders of such return portions or coupons to sell the same, and said defendants and each of them, with full knowledge of the character and terms of said tickets and well aware of the fact that the same are issued at a low special rate to induce and enable the public to attend said reunion, will offer the same for sale and sell them to persons other than the original purchasers at a lower rate than that lawfully charged by orator between the same points on its lines or those of its connection for a like distance one way." (Rec., p. 6.)

The eleventh paragraph reads:

"That by reason of the impossibility of preventing or detecting said frauds as herein set forth, orator, will be subjected to constant and frequently repeated losses and irreparable injury (far exceeding the sum of five thousand dollars, exclusive of interest and costs), and such of the public as shall innocently purchase said tickets to pecuniary losses, as well as to great annoyance and humiliation." (Rec., p. 7.)

The twelfth paragraph undertakes to set forth other fancied injuries to the complainant and to the public. (Rec., p. 7.)

The thirteenth paragraph reads:

"That orator has no adequate remedy at law against said defendants because of the impossibility of securing evidence establishing the facts as to said fraud, and, if such evidence could be obtained, it would necessitate a multiplicity of suits,

because the injury to its business cannot be estimated or compensated in dollars and cents, and because defendants and each of them are financially irresponsible, and no judgments obtained against them at law could be collected on execution" (Rec., p. 7).

The fourteenth paragraph proceeds:

"Orator further shows that at all times it is its custom and usage, and that of its connecting lines, to issue tickets at reduced rates on various occasions to the traveling public, which, by the terms thereof are not transferable, and constitute a special contract in express terms between orator, the lines issuing the same, all other lines over which the same entitle the holder to travel, and the original purchaser thereof, whereby the said original purchaser agrees that said ticket shall not be transferred by him to any other person" (Rec., pp. 7, 8).

The fifteenth paragraph proceeds:

"That the defendants and each of them are, and have been for some time engaged in the business of buying, selling and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and transfer the same to defendants or some of them, with the intent and purpose that such tickets shall be used, in violation of the terms thereof, by persons other than the original purchaser, with the full knowledge on the part of defendants and each of them that the same is a fraud upon orator" (Rec., p. 8).

The sixteenth paragraph continues:

"That unless orator has the injunctive relief herein prayed for, it cannot continue to make special reduced rates as heretofore on the occasion of conventions, Mardi Gras festivals, and other like occasions, frequently occurring, when it is to the great material interest of this city that large

number of visitors should attend, which attendance cannot be secured except by the issuance of special rate non-transferable round trip tickets as aforesaid" (Rec., p. 8).

The seventeenth and eighteenth paragraphs pretend to describe the methods by which ticket brokers conduct their business (Rec., p. 8).

Paragraph XIX alleges:

"That the amount involved in this controversy exceeds, exclusive of interest and costs, the sum of five thousand dollars; that the value of the business which orator seeks to protect and the rights which it seeks to have recognized and enforced exceeds in the case of each defendant the sum of five thousand dollars, exclusive of interest and costs" (Rec., p. 9).

The Answer.

The defendants, besides specifically denying the equities of the bill or meeting each allegation of the bill, with appropriate explanation, allege (Rec., p. 16) that they are each separately engaged and separately licensed as ticket brokers by the City of New Orleans and by the State of Louisiana, and have been so licensed for many years, including the year 1903, and that they are residents and taxpayers of that city; that they know nothing of and have no concern with the business or dealings of any of the other defendants named in the bill, and that they are independent of each other and have no interest in the several businesses of the various defendants (Rec., pp. 16, 17); that in making reductions in rates for the reunion, the railway companies acted in their own interests, with the sole expectation of profit and not out of considerations of sentiment or so-

called patriotism (Rec., p. 18); that the sole alleged fraud intended to be charged against the defendants, is the expected resale by them to persons in the City of New Orleans of the return portions of the proposed tickets, as to which no signature of the original purchaser and no identification of such purchaser are required or expected, and that the false charge of fraud is simply to give color to the bill (Rec., p. 21); that each of the defendants is separately engaged in the business of buying and selling the unused portions of railroad tickets, or what is commonly known as "ticket brokerage," a business that is and has been followed and pursued in all the large cities of the United States for the past twenty-five or thirty years, a business which is recognized as lawful by the State of Louisiana and the City of New Orleans, and which is licensed according to the laws of said State and city (Rec., p. 21); that in accordance with the general custom of the trade, they separately buy and sell the return coupons of railway tickets whether the same are stamped "non-transferable" or not, for the reason that the term "non-transferable" does not import any practical or legal meaning in the business, according to the common understanding of the railways themselves, the ticket brokers, and the traveling public to whom said tickets are issued, who freely sell them to brokers; who in turn sell them to other persons desiring to use said tickets for transportation, when genuine and *bona fide* (Rec., p. 21); and that the conditions as to non-transferability inserted in the tickets are in violation of the Interstate Commerce Law (Rec., p. 23).

The answer further alleges, that the various railroads entering New Orleans have formed an unlawful pool for the purpose of avoiding competi-

tion and to restrain trade and commerce among the several States, in violation of the act of Congress of July 2, 1890, and that the complainant had also violated the provisions of the Interstate Commerce Law (Rec., pp. 29-32).

Subsequent Proceedings.

A preliminary injunction was granted against the defendants on May 16, 1903, by Judge Boarman (Rec., pp. 35, 36).

On January 25, 1904, application was made for a preliminary injunction to restrain the defendants from dealing with tickets used on the occasion of the Mardi Gras festival, which was to be held in New Orleans in the following month (Rec., pp. 64-71), and an injunction to that effect was granted by Judge Parlange on February 8, 1904, his reasons being stated at pages 72-74 of the Record.

The only evidence taken before the Examiner appears Rec., pp. 84-118, and is addressed solely to the subject of damages as bearing on the pecuniary jurisdiction of the court. The case, therefore, was heard practically on bill and answer, and the familiar rule stated by Mr. Phelps in *United States* v. *Joint Traffic Association, 171 U. S., 527,* applies:

"As the case is set down for hearing on bill and answers, no fact alleged in the bill can be taken to be true if denied in the answers, and every fact alleged in the answers must be taken to be true if responsive to the bill. The facts on which the case stands are, therefore, to be found exclusively in the answers either in the admissions or in the responsive averments which they contain."

On January 28, 1905, a final decree was rendered

by Judge Parlange, enjoining the defendants from buying or selling the non-transferable tickets issued by the complainant on the occasion of the United Confederate Veterans Reunion at New Orleans in May, 1903, and at the Mardi Gras festival in New Orleans in February, 1904; but the final clause the decree reads, that it is further ordered, adjudged and decreed "that as to so much of the relief sought by complainant as relates to non-transferable tickets to be hereafter issued, such relief is denied; without prejudice, however, to the right of complainant to seek such relief by independent proceedings on or before each occasion when it may issue such non-transferable tickets." (Rec., pp. 120, 121.)

Both parties appealed from this decree to the United States Circuit Court of Appeals for the Fifth Circuit, the complainant's assignments of error appearing Rec., pp. 122, 123, and being in substance, that the court erred in refusing to grant the complainant the full injunctive relief prayed for.

Assignments of Error.

The defendants' assignments of error appear Rec., p. 127, and are as follows:

1st. The Court erred in assuming, asserting and maintaining in this cause, jurisdiction, inasmuch as the amount involved was less than the lowest limit of this Court's jurisdiction; and the averments of the bill were fictitious, fraudulent and colorable, and made for the purpose solely of seizing the jurisdiction of this Court.

2nd. That for the cause of complaint, if any exists, as recited in the bill, the complainant has a complete and adequate remedy at law, and cannot, upon recitals of fact traversed by the answer,

invoke the equity jurisdiction of the United States Circuit Courts.

3rd. That it is not competent, nor within the power and authority of a Chancellor or of the Circuit Court of the United States, to establish a rule of civil conduct, and by its judgment and decree control in advance those who are charged with being about to breach it, and subjecting them to punishment by contempt process, thereby exercising legislative authority and usurping the functions of a co-ordinate department of the government.

4th. That the right to deal and traffic in railroad tickets as brokers is an inalienable right, that being, under the declared policy of the State of Louisiana, a legitimate business, and that any attempt upon the part of the United States Courts by writ of injunction to deny them the right to conduct the business of ticket brokers is in violation of the Fifth Amendment of the Constitution, which guarantees to every citizen protection in the enjoyment of his life, liberty and property, and of which he cannot be deprived without due process of law.

5th. That under the bill and answer, in the absence of proof, the case should have been determined as upon the bill and answer, defendants' answer meeting and traversing all the equities of the bill.

6th. That the Court erred in perpetuating the instructions issued at the times recited in the motion, after its jurisdiction had been by plea and answer challenged, and there was no proof of injury to the complainant.

7th. That the Court refused on final hearing to pass upon the plea to its jurisdiction, and the record fails to show from the evidence administered that any injury whatever was suffered by the complainant by any acts complained of as against these defendants.

The Circuit Court of Appeals decreed that the complainant's appeal was well taken, and

that the defendants' cross-appeal was not well taken, and remanded the cause to the Circuit Court with instructions to enter a decree in accordance with the views expressed in the opinion of the Court. (Rec., p. 149.)

The Court was divided in opinion, Judges Pardee and Shelby sustaining the contentions of the complainant, Judge McCormick dissenting and being of the opinion that the decree appealed from should be reversed and the suit dismissed for want of equity. (Rec., pp. 133-149.)

Thereupon an application was made to this Court for writ of certiorari, which was granted.

POINTS.

I.

The bill of complaint does not state a cause of action, either at law or in equity, against any of the defendants, even though the tickets in which they dealt, were in form non-transferable, and the original purchasers disposed of them in breach of their contracts with the complainant.

In *People ex rel. Fleischmann* v. *Caldwell* (*64 App. Div., 46; aff'd. 168 N. Y., 671*), it was held that a railroad ticket is property in the constitutional sense of the terms.

It was also decided in that case, as it had been in *People ex rel. Tyroler* v. *The Warden* (*157 N. Y., 116*), that the business of a ticket broker is

legitimate, and that legislation seeking to prohibit it is a violation of the liberty of a citizen and violative of both the State and Federal Constitutions.

The opinion of Chief Judge Parker in the *Tyroler Case* is a convincing exposition of the utility and convenience of ticket brokerage, and a demonstration that it does not operate as a fraud upon railroad companies or an infraction upon any of their legal rights. It disapproves of the conclusions reached by Judge Clark in *Nashville, &c., R. R. Co.* v. *McConnell* (*82 Fed. Rep., 65*), upon which the complainant's cause of action here rests. It rejects as unsound the very basis on which Judge Clark's opinion rests, and without which the conclusion reached would not have been possible.

That decision is the precedent on which, since 1897, various railway companies have made frequent applications to the courts for injunctive relief against ticket brokers, with varying results. In New York it has not been followed. In Missouri and Colorado it has been so enlarged in scope, as to make it seem the expression of conservatism. And yet, an examination of the elaborate opinion discloses that the *ratio decidendi* is scarcely a judicial one.

The tickets there under consideration were issued in connection with the Tennessee Centennial and International Exposition then in progress at Nashville, Tennessee, the home of the learned Justice, whose emotions impelled him to say, p. 78:

"At this point I wish to make some observations upon the condition of things that I am just now dealing with. Here is a great international exposition,—an exposition of incalculable inter-

est and benefit to the public. It has come to be one of the greatest institutions of our time. It is a sure and successful method of wide dissemination of practical knowledge to all the people. It furnishes a ready and entertaining means whereby the citizens of the State and of the Union may learn, in the way of an object lesson, something of the progress of a great country, and its best results. It stimulates pride, and encourages large effort and the highest appreciation of one's own country. Recognizing the public interest involved in the success of the Exposition, it has received liberal appropriation by the national and state legislatures and by the counties and citizens of the state. * * * Vast sums of money have been invested in this great public enterprise. There is involved in the success of the Exposition not only the sums of money thus put into it, but the still larger indirect benefits which result in the way above referred to. It is a thing in which the citizens of the state in general, and of Davidson county and the city of Nashville in particular, take just pride. It is not to be denied that the maintenance of the favorably low rate of travel enormously increases the number of people who attend the Exposition, and thereby insures its success. It is disclosed by this record and not controverted, that the flagrant abuses to which this special Centennial rate is being subjected, with the resulting loss to the carrier companies, have caused the withdrawal of the Centennial ticket low rate by the association of railroads known as the 'Trunk Line Association,' comprising all of the leading railroads east of Washington, D. C., and that such carriers refuse to restore such rate because of the loss entailed by this business of the scalpers at Nashville. * * * There is good ground therefore, for the apprehension that it is now a vital question whether it shall go down in defeat, with state pride humiliated, simply in order that the particular practice complained of may continue. I refer to these public considerations because, as before stated, they are matters which justly appeal to the discretion of the court in determining what

action shall be taken. Are the great public purposes of this Exposition to be thus put in the balance and weighed against this particular branch of the ticket scalpers' trade?''

The same feeling of local pride, set in motion by the threats of the railway companies of withdrawing their so-called excursion tickets unless the courts should restrain the ticket brokers from carrying on their business, is apparent from the opinions in *Schubach* v. *McDonald, 179 Mo., 162*, and *Illinois Central Ry. Co.* v. *Caffrey, 128 Fed. Rep., 128*, where injunctions were granted against the St. Louis ticket brokers at the time of the World's Fair held in commemoration of the Louisiana Purchase.

The bill of complaint in the present case seeks to induce or coerce judicial action by means of the same appeals to local feeling, and the same threats of local injury, as were resorted to so successfully in the cases just cited (*Rec., pp. 3 to 6*).

It is unnecessary to point out the perilous tendencies of such procedure, which substitutes for the eternal principles of justice the outbursts of mob government set in motion by the thumbscrew of intimidation.

But the opinions in these cases, though characterized by the extraordinary argument which has just been considered, and which has no proper place in a juridicial investigation, undertake to confer jurisdiction, on the theory that interference by a court of equity, in cases like the present, is justified for the purpose of preventing a multiplicity of suits.

The soundness of this theory of equity jurisdiction as applied to this case, is considered under Points II and III.

The fundamental question must, however, first be considered, as to whether or not an action at

law would lie, if the transactions which are sought to be restrained, instead of being numerous, had been confined to isolated instances; or, more properly speaking, if there had been but a single case, where a purchaser of a non-transferable ticket had undertaken to dispose of it to a ticket broker, and the latter had in turn sold it to a third party.

This all important inquiry is answered by Judge Clark as follows:

"It is not controverted, as I understand the line of argument, and could not be, I think, that the original purchaser, the ticket broker, and the subsequent purchaser who uses one of these tickets, are severally and jointly liable in an action at law to any or all of these companies in respect to a fraudulent ticket so used over the line of railway of such company or companies. If there had previously existed any doubt upon this subject, it has been put at rest by recent cases of the class to which belongs the now leading case of *Angle* v. *Railway Company 151 U. S., 1.* It is said that the ground on which the liability of a third party for interfering with a contract between others was placed in that case, was that the interference was malicious. It is clear, however, that the only motive for interference by the third party in that case, as well as in other cases cited, was the desire to make a profit to the injury of one of the parties to the contract. There was no malice in the case, beyond this desire to make an unlawful gain to the detriment of one of the parties to the contract; and the case, in principle, clearly controls the question of legal liability. The reasoning in the case is in other respects applicable here. It is, however, unnecessary to further pursue this point of the liability of each one of the parties to the violation of this contract in an action at law by any one of the companies injured. I think there is no doubt of such liability."

This certainly seems to be a most summary method of disposing of a case, which is conceded

to be one of first impression. A somewhat closer analysis of the subject of controversy is demanded, in order that important points of differentiation between this case and the authorities relied upon may not be slurred over.

The situation is this: A. has purchased from the railway company a non-transferable ticket. He comes to B. and asks the latter to purchase it from him. B. complies with the request, and subsequently sells the same ticket to C. Has the railway company, under these circumstances, a cause of action for damages against B?

It is to be noted that B. is not a party or a privy to the contract between the railway company and A. He has no relation whatsoever with either, except that he has purchased from A. a ticket which, we will assume, the latter agreed that he would not sell.

It is to be further noted, that A. is acting on his own initiative; that he has not been induced to sell his ticket by any false or fraudulent misrepresentations of B. or by force, coercion, intimidation, or other similar influence exerted by B.

There is nothing to indicate that B., in purchasing the ticket from A., or in selling it to C., acted out of malice toward the railway company; in fact his motive is believed to be unimportant.

Adler v. *Fenton, 24 How., 407.*
Dickerman v. *Northern Trust Co., 176 U. S., 190.*
McMullen v. *Ritchie, 64 Fed. Rep., 253;*
Toler v. *East Tenn. Ry. Co., 67 Fed. Rep., 168;*
Morris v. *Tuthill, 72 N. Y., 575;*
Davis v. *Flagg, 35 N. J. Eq., 491;*
Phelps v. *Nowlen, 72 N. Y., 39;*

It is further to be noted, that this is not an action by the railway company against A. He is totally eliminated from the controversy. Whatever remedy the railway company may have against him on the theory of a breach of contract, remains unaffected.

We contend, however, that this state of facts does not give rise to a cause of action against B. He had a right to buy the ticket from the original purchaser. He had the right to sell it to another. He is not accountable for what that other person may have done with the ticket. He had the right to deal with the original purchaser and with subsequent purchasers, without subjecting himself to any liability, unless there is some tangible well-established principle of law by which such liability is created.

1. *It is certainly not to be found within the domain of the law of contracts.*

There is no contract or privity of contract between the railroad company and the broker; there is no contractual obligation which the latter has assumed to perform.

In fact the theory of the complainant precludes the conception of a privity of contract, since the very foundation of its contention is, that the contract between it and the original purchaser of the ticket was non-assignable.

In *Spencer's Case, 5 Coke, 16a,* 1 SMITH'S LEADING CASES, *68, it is said:

"3. It was resolved, if a man leases sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for himself and his assigns, at the end of the term to deliver the like cattle or goods as good as the things letten were or such price for them, and the lessee assigns them over, this covenant does not bind

the assignee, for it is but a personal contract, and wants such privity as is between the lessor and the lessee and his assigns of the land in respect of the reversion. But in a case of a lease of personal goods there is not any privity or reversion, but merely a thing in action in the personalty, which cannot bind any one but the covenanter, his executors or administrators who represent him."

In *Garst* v. *Hall & Lyon Co., 179 Mass., 588*, it was held that a stipulation in a contract for the sale of a proprietary medicine which was sold under a registered trade-mark, that the purchaser shall not sell it for less than a specified price, does not follow the medicine into the hands of a subsequent vendee; and he cannot be prevented at the suit of the manufacturer from selling at less than the stipulated price, although he knows that the manufacturer sells only subject to such stipulation. Mr. Justice Knowlton said:

"The purchaser from a purchaser has an absolute right to dispose of the property. He may consume it or sell it to another. The plaintiff has contracts from his vendees in regard to the prices at which they will sell, if they sell at all. If they sell in violation of their contracts with the plaintiff, he has an action against them to recover his damages. This right is founded on a personal contract alone, and it can be enforced only against the contracting party. To say that this contract has attached to the property and follows it through successive sales which severally pass title, is a very different proposition. We know of no authority or any principle which will justify us in so holding."

In *Harrison* v. *Maynard Merrill Co., 61 Fed. Rep., 689*, the complainants, who were publishers of a copyrighted book, had on hand a number of copies which were injured by fire. The books were sold to dealers in old paper, who subse-

quently disposed of them under an agreement that they were to be sold as paper stock only, and not placed on the market. The defendant subsequently purchased these books, with notice of the restriction, but nevertheless undertook to sell them. Although the books were copyrighted an injunction to restrain him was refused by the United States Circuit Court of Appeals for the Second Circuit.

In *Keeler* v. *Standard Folding Bed Co., 157 U. S., 659,* it was decided that one who purchases patented articles from one authorized to sell them in the territory where the purchase is made, becomes possessed of an absolute property therein, unrestricted in time or place, and may sell the same in territory assigned to other persons, although the purchase is made for the purpose of thus selling the same.

See also *Apollinaris Co.* v. *Scherer, 27 Fed. Rep., 18.*

2. *On what theory of tort would a cause of action against the broker rest?*

It is claimed that the broker has enabled the original purchaser to commit a breach of his contract, and puts it into the power of a subsequent purchaser to use the ticket in violation of a contract between the original purchaser and the railroad company. It is, however, difficult to see in what respect the act of the broker constitutes a tort or a breach of duty owing by him to the railroad company. He certainly occupies to it no relation of trust or confidence; nor is there any statutory duty, or one of a kindred nature that he owes to the railroad company. As well might it be said that the owner of a

newspaper is liable for the frauds of an advertiser, because the newspaper is an agency by which the advertiser reaches the public in general, or that the vendor of a revolver is liable for the use made of it.

Or, to suppose a closer parallel—as well might liability be imposed on one to whom a lessee, who has covenanted not to assign his lease, without the lessor's consent, makes an assignment of the lease without such consent.

(a) *In order to support its theory the complainant must first establish the validity of the condition of non-transferability which it has sought to impress upon its tickets.*

It is claimed that the railroad company had the right to impose reasonable conditions upon its passengers. This is doubtless true. It had the right to require the production of a ticket whenever demanded. It had a right to limit the ticket as to time, and as to the train on which it was to be used; and to require it to be stamped before being used. But inasmuch as the ticket is property, we insist that, being a common carrier, bound to transport all seeking its conveniences, without discrimination, it had no right to prohibit the sale and disposition of such tickets, because that would have been the equivalent of depriving the owner of it, of an essential attribute of the property which he had acquired, and the creation of an unjust discrimination, between those seeking transportation over its lines.

The decisions in *Mosher* v. *Railway Company, 127 U. S., 390*, and *Boylan* v. *Railroad Company, 132 U. S., 146*, are generally cited in support of the contention, that railway tickets may be made

non-transferable; but neither of these cases involved that proposition.

In the first of them, a ticket was sold at a reduced rate of fare for passage from St. Louis to Hot Springs and return, and contained a contract signed by the purchaser, by which he agreed that the ticket "is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs within eighty-five days from the date of sale, and when officially signed and dated in ink and duly stamped by said agent," shall be good for five days from that time. The purchaser within eighty-five days, and a reasonable time before the departure of a return train, presented himself with the ticket at the office of the agent of the Hot Springs Railroad at Hot Springs, for the purpose of identifying himself and of having the ticket stamped, but, no agent being at the office, took the return train, and, when the conductor demanded his fare, presented his unstamped ticket, which was refused. It was held that these facts did not give him a cause of action against the railroad company for wrongfully removing him from the train, Mr. Justice Gray saying:

"The conductor of the defendant's train, upon the plaintiff's presenting a ticket bearing no stamp of the agent at Hot Springs, had no authority to waive any condition of the contract, to dispense with the want of such stamp, to inquire into the previous circumstances, or to permit him to travel on the train. It would be inconsistent alike with the express terms of the contract of the parties, and with the proper performance of the duties of the conductor * * * that he should undertake to determine, from oral statements of the passenger or other evidence, facts alleged to have taken place before the beginning of the return trip, and as to which the contract

on the face of the ticket made the stamp of the agent of the Hot Springs Railroad Company at Hot Springs the only and conclusive proof."

The second of these cases arose on substantially the same state of facts.

In both of these cases the question was one of the authentication of the ticket. Here the question is, as to whether, especially in view of the Interstate Commerce Law, which was enacted to place all travelers on an equality and to prevent discrimination in favor of one as against another, a railway company may insist that a round trip ticket sold by it from Chicago to New Orleans and return, can only be used by the individual to whom it was originally delivered, under pain of forfeiture.

We contend, that such a condition is not only invalid, but, in view of the practice which has long prevailed in connection with railroad transportation, unreasonable.

Railroad Co. v. *Lockwood, 17 Wall., 357;*
Liverpool Steam Co. v. *Phoenix Ins. Co., 129 U. S., 443.*

In the law of landlord and tenant involving a private, and not a public relation, it is a well recognized principle that in the case of a covenant not to assign a lease, without a provision for reentry, or forfeiture, the assignment itself is valid, and the lessee is merely liable for damages for breach of the covenant.

Paul v. *Nurse, 8 B. & C., 488.*
Wilson v. *Phillips, 2 Bingh., 13.*
Den v. *Post, 25 N. J. Law, 289.*
Randal v. *Tatum, 98 Cal., 390.*

But assuming that the company had a right to require A, the original purchaser, to identify himself at its office in New Orleans, and to endorse upon the ticket his signature as the means of identification, it by no means follows that the principal acts complained of in the bill constituted such a grievance as would give rise to a cause of action. The purchaser of the ticket had the right to give it away, to destroy it, to use it, and, as we claim, he could dispose of it.

N. Y. C. & H. R. R. Co. v. *Reeves, Appendix II.*

He also had the right to authorize another person to endorse his name on the ticket, and on disposing of his ticket before such endorsement he necessarily gave implied authority to the purchaser to endorse his name if he desired to make use of the ticket. Certainly such a signature is not and cannot be a forgery. It was either expressly or impliedly authorized just as any man may give authority to another to sign or endorse his name to a check, note or draft. Such signature being authorized, although not the name of the party affixing it, is not a forgery within the purview of any penal law.

This has been expressly decided by Mr. Justice Leventritt of the Supreme Court of New York in *People ex rel. Newburn* vs. *Keeper of the City Prison* (unreported).

Here, however, it is not pretended that the railway company required the return ticket to be signed by the original purchaser, or that he should be identified. On the contrary it is affirmatively alleged that the complainant waived these requirements (*Rec., p. 5*).

But, whatever may be the legal right of the

transferee of such a ticket to travel upon it, that is not the question here presented. It is simply, whether or not a broker who buys such a ticket from an original purchaser and disposes of it to another, is liable to the complainant in any form of action.

(*b*) *But assuming that the contract of non-transferability was valid, and that the original purchaser of the ticket committed a breach of contract when he disposed of it, that fact would not support an action at law against the ticket broker under the circumstances of this case.*

(*1*) *The broker did not, by fraud, force or coercion, or by malicious act, bring about such breach of contract, and the case does not therefore fall within the rule laid down in Angle* v. *Chicago, St. Paul, &c., Ry. Co., 151 U. S., 1.*

There, it was alleged that the State of Wisconsin had granted lands in aid of the construction of a railway, to the Portage Company, and other lands for the same purpose to the Omaha Company. The grant to the former was conditioned upon the completion of the road within a specified period. Work was begun, but owing to embarrassment, was suspended. In 1881, while the grant was still in force, a contract was made with Angle for its completion, and the work was diligently prosecuted. In 1882, while the grant was still in force, the Omaha Company by means of fraud, and false representations practiced on the legislature and bribery of and conspiracy with the officials of the Portage Company, induced the legislature to revoke the grant and to bestow it upon itself, the corrupt actor in the conspiracy. This prevented the contractor from completing his contract, to his great damage. His adminis-

tratrix, after obtaining judgment against the Portage Company for damages, filed a bill against the Omaha Company, alleging the fraud on the legislature and that the defendant had conspired with and bribed certain officials of the Portage Company who had become its sole stockholders, to wrest the land grant from the Portage Company and to prevent Angle from completing his contract. It was held that under these circumstances, the Omaha Company, having maliciously and thus fraudulently interfered with the contract between Angle and the Portage Company, and induced the latter to break it, an action was maintainable against the wrongdoer.

In that case, as well as in those which were cited in the opinion, as will be presently seen, the party proceeded against was guilty of malicious and affirmatively fraudulent misconduct, which prevented or interfered with one who would otherwise have carried out a contract, from performing it, to the injury of the other contracting party. In every instance, actual and substantial damage resulted from the breach of the contract, thus maliciously and fraudulently induced.

Here, there is nothing to indicate that the defendants acted out of fraud or malice; on the contrary, they deny every allegation of fraud, and there is no proof of actual fraud on their part to be found in the record. *Non constat* the several purchasers of non-transferable tickets who offered them for sale to the defendants, acted of their own volition and induced the defendants to purchase the tickets. The defendants certainly were not prevented by any contract on their part, from disposing of the tickets, with or without consideration, after they had acquired them.

Moreover, in all of these cases the contracts

were executory as between the parties thereto, while here it was executed. The sale of the ticket by the railway company to its passenger was a completed transaction; the ticket had been delivered and the purchase price paid. The railway company merely sought to impose a condition upon the use, which the passenger might make of the ticket.

The rule applicable to this subject has been most carefully formulated in *Cooley on Torts, 2nd Ed., p. 581, *497*, by that eminent author as follows:

"An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it. But if the third person was induced to break his contract *by deception*, it may be different. If, for example, one were to personate a vendee of goods and receive and pay for them as on a sale to himself, the vendee would have his action against the vendor; but he might also pursue the party who, by deceiving one, had defrauded both. And where the performance of a contract is prevented by deceiving the party about to make it, it is immaterial that the contract was not binding under the Statute of Frauds, because not in writing; the defect being one the party had a right to waive."

That this distinction is sound, is indicated by the leading cases which were cited in *Angle v. Chicago, St. Paul, &c., Ry. Co., supra.*

Thus, in *Green v. Button, 2 Cr. Mees. & R., 707*, the defendant, by falsely pretending to one party to a contract that he had a lien upon certain property, which was the subject matter of the contract, prevented such party from delivering it to the plaintiff, the other party to the contract.

There, deception was practiced by the defend-

ant, on the person who was guilty of a breach of contract, in order to induce such breach.

In *Benton v. Pratt, 2 Wend., 385* and *Rice v. Manley, 66 N. Y., 82*, parties who had contracted to sell and deliver, in the one case cattle, and in the other case cheese, to the plaintiffs, were, by the fraud of the defendants, made to believe that their co-contracting parties did not desire the property contracted for, and by means of such fraud alone, breaches of contract were induced.

The cases of *Lumley v. Gye, 2 El. & Bl., 216; Bowen v. Hall, L. R., 6 Q. B. D., 333, 337; Haskins v. Royster, 70 N. C., 601, and Walker v. Cronin, 107 Mass., 555*, although apparently based on the theory of a malicious interference between employer and employed, whereby the latter were induced to break their contracts of service, are in fact grounded on the *Statute of Laborers* passed in *25 Edw. III*, whereby the enticing away of a servant from his employer was made actionable tort, or at least on that statute as an analogue.

In *Ashley v. Dixon, 48 N. Y., 430*, it was held that if A has agreed to sell property to B, C may, at any time before the title has passed, induce A to sell it to him instead, and if not guilty of fraud or misrepresentation, he does not incur any liability, and this is so, although C may have contracted to purchase the property from B. Judge Earl, after stating this proposition, added:

"While, by the moral law, C is under obligation to abstain from any interference with the contract between A and B, yet it is one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce. But if C makes use of any fraudulent misrepresentations, as to B, to induce A to violate his contract with him, then there is a fraud accompanied with damages, which gives B a cause of action against C;

as if C fraudulently represents to A that B had failed or absconded, or had declared his intention not to sell to B, and thus induces A to sell to another."

This case was cited with approval in *First National Bank v. Whitman, 94 U. S., 345* and in *Insurance Company v. Braham, 95 U. S., 759.*

In *Chambers v. Baldwin, 91 Ky., 121,* the Court of Appeals of Kentucky stated the rule to be, that inducing another to break his contract will not render one liable to the other party to the contract, although it is done maliciously and for the sake of profit, if without force or fraud, and that an act which does not of itself amount to a legal wrong cannot be made so by a bad motive.

After stating the rule above quoted from Cooley on Torts, Mr. Justice Lewis added:

"And it seems to us that the rule harmonizes with both principle and policy, and to it there can be safely and consistently made but two classes of exception; for, as to make a contract binding, the parties must be competent to contract, and do so freely, the natural and reasonable presumption is that each party enters into it with his eyes open, and the purpose and expectation of looking alone to the other for redress in case of breach by him. One such exception was made by the English Statute of Laborers to apply where apprentices, menial servants and others whose sole means of living was manual labor, were enticed to leave their employment, and may be applied in this state in virtue of and as regulated by our own statutes. The other arises where a person has been procured against his will, or contrary to his purpose, by coercion or deception of another, to break his contract. But as Wise was not induced by either force or fraud to break the contract in question, it must be regarded as having been done of his will, and for his own benefit. And his voluntary and distinct act, not that of appellee,

being the proximate cause of damage to appellants, they, according to a familiar and reasonable principle of law, cannot seek redress elsewhere than from him."

In *Boysen* v. *Thorn, 98 Cal., 578,* the Supreme Court of California held, that maliciously inducing another to break a contract with a third person will not create a liability to the latter, when it is done without fraud, threats, violence, falsehood or deception.

In *Daly v. Cornwell, 34 App. Div.* (*N. Y., 27*), a similar conclusion was reached; as also in *Kimball v. Harmon, 34 Md., 407,* and *McCann v. Wolff, 28 Mo. App., 447,* although in the latter case malice was considered a ground for intervention.

In the great case of *Allen* v. *Flood* (*L. R., 1 App. Cas., 1898, 1*), the House of Lords decided, that an action will not lie in favor of one who has been discharged from his employment against persons who insisted, even maliciously, that his employer should discharge him. In other words, such an act, although almost identical in character with that which is here complained of, was held to be *damnum sine injuria.* Here we contend there is no legitimate ground for even claiming that legal damage could result from the act of the broker. The opinions in that case present an admirable philosophical discussion of the basic theory of an action in tort, and it is confidently believed that as a result of a consideration of them the acts here complained of will not be considered sufficient to give rise to any cause of action against the defendants.

This reasoning has received the approval of Mr. Justice Lambert in *N. Y. C. & H. R. R. R. Co.* v. *Reeves, 41 Misc. Rep., 490.*

In *Adler v. Fenton, 24 How., 407,* this Court

went to the extent of holding, that a creditor whose debt is not yet due, cannot maintain an action against his debtor and others, who are charged to have conspired with him, to dispose of his property fraudulently, so as to hinder and defeat his creditors in the collection of their lawful demands. *This was not merely such an interference with a contract, as to induce its breach, but an affirmatively fraudulent coöperation with one of the contracting parties, to disable him from performing his obligations.*

In support of the conclusion reached, Mr. Justice Campbell said:

"Adler and Schiff were the lawful owners of the property at the time this suit was commenced. They had the legal right to use and enjoy it to the exclusion of others, and no one had any right to interfere with their use or disposition; none, unless there be a right conferred by the law upon a creditor to prevent the accomplishment of fraud by his debtor, and to pursue him, and others assisting him, for a revocation of acts done to hinder, delay, or defraud him, in the collection of his demand. The authorities are clear, that chancery will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it. In *Moran v. Dawes, Hopkin's Ch. R., 365,* the court says: 'Our laws determine with accuracy the time and manner in which the property of a debtor ceases to be subject to his disposition, and becomes subject to the rights of his creditor. A creditor acquires a lien upon the lands of his debtor by a judgment; and upon the personal goods of the debtor, by the delivery of an execution to the sheriff. It is only by these liens that a creditor has any vested or specific right in the property of his debtor. Before these liens are acquired the debtor has full dominion over his property; he may convert one species of property into another, and he may alienate to a purchaser. The rights of the debtor

and those of the creditor, are thus defined by positive rules; and the points at which the power of the debtor ceases, and the right of the creditor commences, are clearly established. These regulations cannot be contravened or varied by any interposition of equity. There are cases in which the violation of the rights of a creditor within these limits has formed the subject of an action at law against third persons. But the analogies of the law, and the doctrine of adjudged cases, will not allow an extension by the courts of a remedy employed in those cases in favor of a general creditor.' * * * Unquestionably, the claims of morality and justice, as well as the legitimate interests of creditors, require that there should be protection against those acts of an insolvent or dishonest debtor that are contrary to the prescriptions of law, and are unfaithful and injurious. But the legislature must determine upon the remedies appropriate for this end. * * * In the absence of special legislation, we may safely affirm, that a general creditor cannot bring an action on the case against his debtor, or against those combining and colluding with him to make disposition of his property, although the object of those dispositions be to hinder, delay, and defraud creditors."

In *Hurwitz v. Hurwitz, 10 Misc. Rep. (N. Y.) 353,* involving a similar state of facts, this decision was followed in a masterly opinion by Mr. Justice Pryor.

(II) But even if it should be conceded that the facts, just considered constitute an injuria, we contend that no cause of action is established, because of the absence of such legal damage, as is necessary to be conjoined to a wrong, juridically considered, in order to make out a cause of action.

Even in *Bowen* v. *Hall, 6 Q. B. Div., 333, 337,* Brett, L. J., says in language quoted in the *Angle case*:

"Whenever a man does an act which in law and in fact is a wrongful act, and such an act as may, *as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury,* an action on the case will lie."

Stripped of all verbiage the complainant's argument is, that a ticket has been issued by it to A, which the latter, through the agency of the broker, has disposed of to B, who travels upon it over the complainant's lines instead of A. It is difficult to understand any legitimate theory on which the complainant can claim to have been legally injured by such an act. When it sold to A a round trip ticket from Chicago to New Orleans and return, it contracted to transport a passenger from Chicago to New Orleans, and from New Orleans to Chicago. So far as the difficulty of performing the task was concerned, it was no greater if the person transported was named B, than it would have been if he had been named A. The number of miles traveled would have been the same, the space occupied identical, the time required for transportation no different, the friction upon the rolling stock of no greater degree, in the one case than in the other. A acquired a contract which represented an obligation on the part of the railroad company, both legal and moral, in consideration of the amount of fare demanded and paid, to give a round trip to the passenger presenting the ticket.

Irrespective of the points of difference, between this case and *Angle* v. *Chicago, St. Paul, &c., Ry. Co.,* and kindred cases, which have already been pointed out, there is this *further* fundamental distinction between the present case and those cited, that while in the latter the breach of contract induced by the alleged wrongdoers, as a natural and

direct consequence produced substantial damage, in the present case the purchases by the defendants of the so-called non-transferable tickets caused no damage whatsoever to the railway company. It had received from its vendee, not only the stipulated compensation for the trip from the initial point of travel to the point of destination, but also for the return trip. If the vendee did not avail himself of the return trip privilege, the railway company would not have profited by such failure. The passenger would simply have been the loser by the transaction, and the fact that the vendee of the ticket gave or sold it directly or indirectly to another passenger, who availed himself of the return privilege, did not result in any substantial legal damage to the railway company, for the reasons above considered.

Nor is there any equity in the contention, that but for the sale of the ticket the original vendee would not have availed himself of his return privilege, and the railway company might have sold another ticket at an enhanced price to the transferee. As a proposition in ethics, the company suffered no harm by transporting on the return trip under such a ticket, B instead of A; and a jurist of the high character of Chief Judge Parker, was unable to comprehend the sophism by which such a transaction was sought to be denounced as a fraud, for he says in *People ex rel Tyroler* v. *Warden, 157 N. Y., 116:*

"I confess I am unable to see how such a sale defrauds a transportation company. If a transportation company sells a ticket from New York to San Francisco, it undertakes to carry the holder from one place to another. It costs the company no more to carry one person than it does the other. How then can it be defrauded or in any way prejudiced by the transfer of such ticket by the purchaser to another person?"

II.

The complainant has shown no sufficient ground for equitable intervention since, assuming, but not admitting, that the acts charged against the defendants are wrongful, tortious or even fraudulent, it has a plain, adequate and complete remedy at law to redress such wrongs.

The Judiciary Act of 1789, which defines the jurisdiction of the Federal courts, declares that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law."

The Seventh Amendment of the Constitution declares that "in suits at common law where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved."

This provision of the Judiciary Act has been frequently applied, even by the courts *sua sponte,* so that it has become a rule of constant application that whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law because the defendant has a constitutional right of trial by jury.

Hipp v. *Babin, 19 How. U. S., 278.*

Thus in *Parker* v. *Winnipiseogee Lake Co.* (*2 Black, 551*), a suit for diversion of plaintiff's water was held not maintainable where an adequate remedy to recover damages existed at law.

In *Insurance Co.* v. *Bailey* (*13 Wall., 621*), jurisdiction of a suit to cancel a policy obtained through fraud, and which constituted a defense to a suit on the policy, was denied.

In *Grand Chute* v. *Winegar* (*15 Wall., 375*), equitable relief against the obligation of illegally issued municipal bonds as to which a legal defense existed, was withheld.

In *Root* v. *Railway Co.* (*105 U. S., 212*), a bill for account of profits and damages for infringement of an expired patent was dismissed on the ground of want of jurisdiction.

In *Killian* v. *Ebbinghaus* (*110 U. S., 573*), jurisdiction of a bill in the nature of a bill of interpleader was denied where the desired relief was obtainable in ejectment.

In *Fussell* v. *Gregg* (*113 U. S., 555*), jurisdiction of a bill against trespassers by the owner of the equitable title for possession was denied.

In *Buzard* v. *Houston* (*119 U. S., 351*), it was held that a bill to recover damages for fraud and deceit, which might be recoverable in a legal action could not be maintained.

In *Cates* v. *Allen* (*149 U. S., 451*), it was held that a contract creditor who has not reduced his claim to judgment has no standing in a court of equity upon a bill to set aside and vacate a fraudulent conveyance.

In *Whitehead* v. *Shattuck* (*138 U. S., 146*), a bill to quiet title to real estate was held not maintainable since the remedy by ejectment was adequate.

It is unnecessary to multiply citations to de-

cisions of this court, but it may prove more useful to consider more closely a number of the cases to which reference has been made.

Thus in *Grand Chute* v. *Winegar* (*supra*), the bill of complaint alleged that the bonds of the complainant, a municipal corporation, were issued without authority, in violation of law and in fraud of the town; that the obligee knew this when he took them; that his possession was merely colorable; that he parted with no value, and never had any right or title to the bonds. The relief sought was to enjoin the obligee from proceeding and to compel the surrender of the bonds.

In its general nature the action was very much like the present, yet it was held that it could not be maintained. Mr. Justice Hunt said:

"The right of trial by jury is a great constitutional right, and it is only in exceptional cases and for specified causes that a party may be deprived of it. It is in vindication of this great principle, and as declaratory of the common law, that the Judiciary Act of 1789, in its sixteenth section, declares 'that suits in equity shall not be sustained in either of the courts of the United States in any case where adequate and complete remedy may be had at law.'

"A demurrer having been interposed to the present bill, all of its allegations are to be taken as true. This is so both in favor of the plaintiff and against him. It seems quite clear upon the statements of the bill that the defence to the suit at law upon the bonds is adequate and complete. Thus, the bonds, it is alleged, were issued without authority and in fraudulent violation of the duty of those having the subject in charge. It is not suggested that there is any difficulty, either legal or practical, in establishing these facts by competent proof. If proven, they furnish as complete a defence to the suit at law to recover the amount of

the bonds as they do in equity. In each suit the question arises, were they received by Winegar before their maturity, without knowledge of the defence, and for a valuable consideration by him paid on the purchase thereof? * * *

"A judgment against Winegar in the suit brought by him would be as conclusive upon the validity of the bonds, would as effectually prevent all future vexatious litigation, would expose the fraud, and prevent future deception as perfectly and thoroughly as would a judgment in the equity suit. Under such circumstances there is no authority for bringing this suit in equity."

In *Buzard* v. *Houston* (*supra*), a bill in equity alleged that the defendant, after agreeing in writing to sell to the plaintiff a certain number of cattle at a specified price, induced him to surrender the agreement and to receive instead thereof an assignment from the defendant of a similar contract of a third person with him, and also to pay the defendant a sum of money, and to give an obligation to pay him another sum, by false and fraudulent representations as to the solvency of that person; and prayed for a cancelation of the assignment and obligation, for a reinstatement and confirmation of the original agreements and their enforcement on such terms as the court might direct, or else for a repayment of the sum paid, and for damages and further relief.

As has already been stated, it was held that a suit in equity could not be maintained, Mr. Justice Gray saying:

"The present bill states a case for which an action of deceit could be maintained at law, and would afford full, adequate and complete remedy."

It was sought to maintain the action upon the theory that the case involved the element of fraud, but it was decided that that would not justify equitable intervention. It was further insisted that equity would intervene because the bill prayed for a discovery, but Mr. Justice Gray said:

"It is enough to say that the case clearly falls within the statement of Chief Justice Marshall: 'But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law.' Russell *v.* Clarke, 7 Cranch, 69, 89."

In *Root* v. *Railway Co.* (*supra*) jurisdiction was also sought to be justified on the theory that in order to give the plaintiff complete relief the defendant should be required to account and to make discovery of his profits as an infringer of a patent, but in a most elaborate opinion by Mr. Justice Matthews the existence of jurisdiction was denied. At page 207 he said:

"It is the fundamental characteristic and limit of the jurisdiction in equity that it cannot give relief where there is a plain and adequate and complete remedy at law; and hence it had no original, independent, and inherent power to afford redress for breaches of contract or torts, by awarding damages; for to do that was the very office of proceedings at law."

The court then cites and follows the case of *Hipp* v. *Babin* (*supra*), and at page 215 says:

"Our conclusion is, that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is, to secure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but, that grounds of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances as furnishing a clear and satisfactory ground of exception from the general rule."

In the cases cited, and in many others which might be added, there are to be found the same elements as those which exist in the present case.

In *Grand Chute* v. *Winegar*, negotiable bonds had been issued without authority and were in the hands of one who had notice of their invalidity. This corresponds to the element in the present case which is involved in the allegations that non-transferable tickets have been issued or will be issued by the complainant, and have been or will be acquired by the defendants under circumstances indicating knowledge on their part that the vendor in disposing of them is violating the terms of the tickets.

In *Buzard* v. *Houston,* there was the element of fraud and deceit.

In *Root* v. *Railway Co.,* the defendant was a tortious violator of the complainant's rights as an inventor and interfered with the latter's enjoyment of the right secured to him under his letters patent.

Yet in all of these cases it was held that equity would not intervene because there was an adequate remedy at law.

Here, again assuming that any wrongs were perpetrated, the bill of complaint shows that the complainant was possessed of numerous legal remedies. It had the right to take up the tickets if presented by a party other than the original purchaser. It had the right to proceed by action at law against such purchaser. If the complainant had any cause of action whatsoever against the defendants it certainly could proceed against such of them as invaded its rights by an action at law to recover the damages inflicted upon it. The foundation of the complainant's cause of action must be a breach by the defendants of a legal right appertaining to it. An analysis of the bill of complaint indicates that the right claimed to have been invaded was, if anything, asserted to be a right of property. If such a right was violated, then of necessity such infraction must be cognizable in an action at law.

The complainant recognizes that the alleged injury inflicted is measurable in money damages, for it alleges that it has been and will be injured in a sum exceeding five thousand dollars. That fact of itself indicates that there is no necessity for equitable intervention.

But it is claimed that equity should grant re-

lief in this case because thereby a multiplicity of actions might be avoided, and that in many instances the persons who travel on tickets sold by the defendants are not within the jurisdiction of this court, or are insolvent. The proof is silent on these points.

The mere fact of the insolvency of such persons is not sufficient to become the basis of equitable intervention; otherwise equity might intervene to give relief in cases of assault and battery, or for any tort or breach of contract that may be committed. Neither is the fact that some of the parties who might be proceeded against are not within the jurisdiction of the court a sufficient ground for intervention. They can be proceeded against elsewhere.

But so far as the defendants are concerned it is immaterial whether or not the person traveling upon a non-transferable ticket can be proceeded against. The question is, whether or not so far as the defendants have been guilty of a wrongful, tortious or fraudulent act they can be proceeded against. There is no question but that they are within the jurisdiction of the court. It is not shown that they are insolvent; nor is it necessary that as to them there shall be a multiplicity of suits. Even though they should be guilty of numerous violations of complainant's rights, such violations could be made the subject of a single action; and even if numerous actions should be brought there is adequate provision for the consolidation of such actions.

As further illustrating these views cases from other jurisdictions may be cited.

In *3 Pomeroy's Equity Jurisprudence, Section 1338*, the author says:

"Equity will not interfere to restrain the breach of a contract or the commission of a tort or the violation of any right when the legal remedy of compensatory damages will be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which under the settled doctrine determines the right."

Jersey City v. *Gardiner, 33 N. J., 622.*
Parker v. *Winnipiseogee, 2 Black, 545.*
Watson v. *Sutherland, 5 Wall., 7.*
North v. *Peters, 138 U. S., 271.*

An injunction will not be granted to restrain arrests.

Davis v. *American Soc. Prev. Cruelty to Animals, 75 N. Y., 362.*

Neither will an injunction be granted to restrain criminal acts.

Life Association v. *Boogher, 3 Mo. App., 173.*

The American courts have declined to extend the jurisdiction of equity to the extent of restraining such torts as libels on business, slanders of title, and the like.

Thus, in *Raymond* v. *Russell* (*143 Mass., 295*), Chief Justice Morton said:

"It is not within the jurisdiction of a court of equity to restrain by injunction representations as to character and standing of plaintiff or as to his property, although such representations may be false, if there be no breach of trust or of contract involved."

Boston Diatite v. *Florence Mfg. Co.*, *114 Mass., 69*, and cases cited.
Whitehead v. *Kitson*, *119 Mass., 484.*
Prudential Assurance v. *Knott*, *L. R. 10 Ch.*, 142.

In *Life Association* v. *Boogher* (*3 Mo. App., 173*), it was likewise held that an injunction to restrain a libellous publication concerning the plaintiff's business was not to be granted.

In *Marlin Fire Arms Co.* v. *Shields* (*171 N. Y., 384*), it was held that the publication of an unjust and malicious criticism of a manufactured article is not the subject of equitable cognizance, although the manufacturer has no remedy at law because of inability to prove special damages; citing many cases.

In *Tiede* v. *Schneidt* (*74 N. W. 798, Wisc.*), it was held that equity cannot restrain the maintenance of a slaughter house on a stream flowing through a city merely because it was made a misdemeanor by statute.

In *Rochester* v. *Walters* (*60 N. W., 1101*, Indiana), it was held that an injunction would not be granted at the suit of a municipality to restrain the erection of a wooden building in violation of a penal ordinance.

To the same effect is *Mayor, &c.*, v. *Smyth* (*10 Atl. 700, N. H.*).

In *State* v. *Patterson* (*37 S. W., 478, Texas*), it was held that equity will not enjoin the commission of the statutory offense of keeping a common gambling house.

To the same effect is *People ex rel. L'Abbe* v. *District Court, 26 Col., 386.*

In *Ocean City Assn.* v. *Schurch* (*57 N. J., Eq., 268*), it was held that an injunction would not be granted to restrain the violation of a covenant in a deed against doing business on the premises on Sunday on the ground that such act was criminal.

In *O'Brien* v. *Harris* (*105 Ga., 732*), it was held that equity has no jurisdiction to interfere in matters merely criminal, or to enjoin any one from the commission of a crime when it does not appear that the acts complained of affect any property rights of the petitioners.

In *City of Mount Vernon* v. *Seeley* (*74 App. Div., 50*) it was held that a city could not maintain an action to enjoin the defendants from posting bills in violation of a city ordinance.

In *Davis* v. *American Society for the Prevention of Cruelty to Animals* (*78 N. Y., 362*), it was held that an injunction could not be granted to restrain an officer of the defendant from making arrests on the ground that the acts complained of were not violations of the statute.

In *Fisher* v. *Lakeside Park Hotel & Amusement Co.* (*4 Ohio, 329*), it was held that an injunction will not be granted on the suit of a private person to enjoin the violation of the Sunday law, since equity has no jurisdiction in matters merely political, illegal or immoral.

In *York* v. *Yzaguairre* (*71 S. W., 563*), it was held that an injunction cannot be granted to restrain a barber from keeping his shop open on Sunday in violation of a provision of the Penal Code.

A court of equity has no jurisdiction to restrain the collection of a promissory note which has been materially changed after its execution.

Mutual Life Ins. Co. v. *Reals, 79 N. Y., 202.*
American Water Works Co. v. *Venner, 45 N. Y. St. Rep., 441.*
Northern Pacific R. R. Co. v. *Kennon, 45 Fed. Rep., 517.*
Tracy v. *Monnet Maryland, 20 Atl., 196.*
Erricson v. *First Natl. Bank (Neb.), 28 L. R. A., 577.*

In *Fowler* v. *Palmer* (*62 N. Y., 533*), it was held that an action cannot be maintained to cancel a note and to restrain the bringing of a suit or from selling or disposing of a note on the ground that it has been paid.

To the same effect are the cases of *Town of Venice* v. *Woodruff* (*62 N. Y., 462, 467*), *Town of Springport* v. *Teutonia Savings Bank* (*75 N. Y., 397, 401*), and, finally, a case directly in point is *N. Y. C. & H. R. R. R. Co.* v. *Reeves* (*41 Misc. Rep. N. Y., 490*). (*See Appendix*) where Mr. Justice Lambert ably deals with this aspect of the case.

The subject of the exercise of equity jurisdiction on theory of seeking an avoidance of a multiplicity of actions is considered under Point III (*infra*).

III.

There was an improper joinder of defendants and of independent causes of action. The bill is multifarious and the case does not fall within the rule concerning the avoidance of a multiplicity of suits.

But for the decision in *Nashville, etc., Ry. Co.* v. *McConnell*, 82 Fed. Rep., 72, and the cases following the present action would present a most novel and startling attempt to extend the equity powers of the Federal courts. Seven separate and independent defendants, each liable, if at all, upon a separate and independent cause of action, with each cause of action founded upon distinct acts of the several defendants, are brought together in an omnibus bill and sought to be enjoined from doing various acts of the most widely divergent character.

The ground of jurisdiction asserted by the complainant is the alleged inadequacy of its remedy at law, and an appeal to the familiar rules against multiplicity of suits. The alleged inadequacy of the complainant's legal remedy proceeds upon its inability to detect the various frauds which some of the defendants are claimed to be practising upon it. In other words, the complainant asks the court to transform itself into an inquisition to ascertain against which of the defendants it has a cause of action, and what its cause of action against such defendnts may be.

We presume that if, while one of the complainant's trains was passing through the city, some

irresponsible citizen should break a window of one of the cars, the complainant would be equally without means of determining who had committed the wrong; but we do not understand that this court would take jurisdiction of an action against the entire population of New Orleans to enable complainant to locate the responsibility.

Or, to make the case more analogous, if some of the citizens of New Orleans, some by doing mob violence to the incoming trains of the complainant; others by circulating slanderous rumors as to the safety of its transportation facilities, and still others by acts such as are set forth in the bill of complaint, should interfere with the complainant's traffic to and from that city, it is not very probable that equity would assume jurisdiction either because these various wrongs had in common the diminution of complainant's profits, or because its brakemen or conductors were unable to supply information to enable complainant to institute the necessary action for damages.

A careful analysis of the bill of complaint indicates that its gravamen rests upon the theory that seven different individuals, engaged in seven separate and independent undertakings, having no relation of partners to one another, not united by the tie of being stockholders in a common corporation, are engaged in perpetuating separate and independent wrongs upon the complainant. This certainly does not warrant the joinder of all of these alleged wrongdoers as defendants in a single action. There are seven independent causes of action against as many individuals, but they are as distinct as though each of the seven defendants had been bound by a separate contract obligation to the same individual. It could not be

pretended for a moment that one action could be brought for the purpose of enforcing these seven independent obligations.

In like manner, seven different individuals might on the same day commit an assault and battery upon one person. The mere fact that seven assaults had taken place and that the party wronged has in each instance been the same does not warrant the joinder of the seven defendants in a single suit, unless they all united in one and the same assault.

The basis of the complainant's claim for relief is that the several ticket brokers have been guilty of a tort by purchasing from the original purchasers tickets sold in violation of their contracts, and of enabling the subsequent purchaser to become substituted for the original purchaser. If this means anything it is that the ticket broker who has participated in such an act has committed a tort cognizable in an action at law. The fact that the torts are numerous does not, however, give rise to equity jurisdiction any more than the fact that a debtor has incurred numerous obligations in the form of promissory notes, or that a newspaper has been guilty of publishing numerous libels against a certain individual.

Whatever might, however, be said respecting the right of the complainant to bring a suit in equity against a single broker to restrain the perpetration by him of a series of wrongful acts, it is an entirely different proposition to assert that a suit in equity may be brought against seven different individuals, each of whom, independently of all the others, performs a series of wrongful acts of a similar nature to that which is committed by the others proceeded against.

As well might it be claimed that if all the news-

papers in the United States should publish a series of articles against a candidate for office, which are libellous in their nature and similar in kind, that he might come into a court of equity and, joining them all as defendants, seek injunctive relief against them in a single suit. Each defendant has a right to interpose such defenses as he has, unhampered and unembarrassed by the defense or lack of defense which other of the parties proceeded against might have. A may be able to show that he has not perpetrated any of the acts complained of; B that he has acted under authority and license from the complainant; C that he has a release—and so on.

The very theory which underlies the well-established rules of procedure which prohibit the improper joinder of causes of action, namely, that each defendant should have the right to litigate with respect to such matters only in which he is concerned and without unnecessary expense by reason of the aggregation of issues to which he bears no relation, exists in the present case.

There has been much confusion in the use of the phrase, that equity acquires jurisdiction in order to avoid a multiplicity of suits. Equity never interferes to save the plaintiff from the labor and expense of pursuing distinct legal causes of action against different defendants. The doctrine exists for the protection of defendants who otherwise would be exposed to numerous actions arising out of the same general matter from plaintiffs having a community of adverse interests, or from plaintiffs whose rights in common in a fund would be impaired or complicated from numerous plaintiffs pursuing the same defendant or the same fund. In other words, a multiplicity of plaintiffs in

separate actions against the same defendants may be ground for interposition for the purpose of saving a multiplicity of suits. But a multiplicity of defendants against whom a single plaintiff seeks relief with respect to the commission of tortious acts, has never been held by any authoritative decision as a ground for proceeding in equity.

The above grounds for equity jurisdiction are well stated by the following authorities:

Pfohl v. Simpson, 74 N. Y., 142.
Boughton v. City of Brooklyn, 15 Barb., 375.
2 Story Eq. Jur. §§853, 854.
Tribette v. Railroad Co., 70 Miss., 182.

In *Pfohl v. Simpson* (*supra*) Folger, J., says:

"It is in cases where many persons have claims and are prosecuting or about to prosecute them at law against one defendant or against a class of defendants or against a fund liable in equal degree to all those persons and to others, and thus there arises the fact of the probability of a multiplicity of actions, that this jurisdiction of equity attaches."

In *Boughton v. City of Brooklyn* (*supra*) Strong, J., says:

"That the practice of equity interposing to prevent a multiplicity of suits was originally introduced for the protection of any one who might be threatened with the attacks of numerous litigants having in common claims against him *based upon the same facts* and principles." • • •

"It will be seen in these actions that there is a common right to be asserted or maintained in which numbers either on the one side or the other or upon both sides have a common interest, or there must have been repeated attempts to litigate the same questions as in the old action of ejectment where the verdicts and judgments did not conclude the parties. These opinions are commended as 'elaborate and learned examinations of the jurisdiction of the court in preventing a multiplicity of suits' in *Howell* v. *City of Buffalo, 2 N. Y. Court of Appeals Decisions, 412.*"

In *Tribette* v. *Railroad Co.* (*supra*) the learned Judge writing the opinion says:

"The cases establish this proposition, namely: Where each of several may proceed or be proceeded against in equity, their joinder as plaintiffs or defendants in one suit is not objectionable. But this is a very different question from that whether, merely because many actions at law arise out of the same transaction or grounds and depend upon the same matters of fact and law, that all may proceed or be proceeded against jointly in one suit in chancery, and it is believed that it has never been so held and never will be in cases like those here involved. Where each of the parties may proceed in equity separately they are permitted to unite and make common interest against a common adversary, and one may implead or be impleaded in one suit many who are his adversaries in a matter common to all in many cases, but never when the only ground of relief sought is that the adversaries are numerous and the suits are for that not in itself a matter of equity cognizance" (p. 187).

Again the court says, p. 191:

"If preventing multiplicity of suits is such a good thing as to justify bringing into one suit all

who are interested in the same questions of law and fact, it is needful that its benefit should be extended to all cases where it can be applied, and not restricted in its beneficent operation. It should have full sway in all classes of cases. The sole object, we are told, of the doctrine is to prevent multiplicity of suits by uniting all who have a common interest in the same question in one suit, and it is quite as important to effect this in one class of cases as another, and as actions against railroad companies are quite numerous, it is of especial concern to prevent multiplicity in this class of cases. Therefore, if the doctrine advanced were sound it would have to be applied wherever the conditions prescribed exist; that is, wherever many are interested in the same question of fact and law. That this is inadmissible must be apparent."

This principle has been applied in *Dykman* v. *Keeney* (154 N. Y., 453, and in the case of *O'Brien* v. *Fitzgerald* (150 N. Y., 572), and *Empire State Savings Bank of Buffalo* v. *Beard* (151 N. Y., 638), therein referred to.

There is no such common question of privity of interest among the defendants as will authorize the maintenance of one single action against them on the theory of a bill of peace.

The latest discussion of the principles of equity jurisdiction of the theory of a bill of peace is found in *Hale* v. *Allinson* (*188 U. S., 56*). It was there held that a single action in equity cannot be maintained by the receiver of an insolvent corporation against the various stockholders to enforce their statutory liability on the ground that such single action would prevent a multiplicity of suits. Mr. Justice Peckham gives an elaborate review of the authorities, beginning with the case of *Mayor of York* v. *Pilkington* (*1 Atk., 282*, de-

cided in 1837). He concludes by quoting the language of Judge McPherson in the court below (*102 Fed. Rep., 790*) in dealing with the question before the court as to the receiver's right to maintain the action against the stockholders.

The following is a portion of Judge McPherson's opinion quoted by Judge Peckham:

"Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defence, and defences may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defences are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability. Suppose A to aver that his signature to the subscription list was a forgery; what connection has that averment to B's contention, that his subscription was made by an agent who had exceeded his powers? or with C's defence, that his subscription was obtained by fraudulent representations? or with D's defence, that he has discharged his full liability by a voluntary payment to the receiver himself? or with E's defence, that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defences, having nothing

in common; and upon each, the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional right. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law."

"We are in accord with the views thus expressed," said Mr. Justice Peckham, "and we therefore must deny the jurisdiction of equity so far as it is based upon the asserted prevention of a multiplicity of suits."

In *Marsh* v. *Kaye* (*168 N. Y., 196*) it was held that an action could not be maintained in equity by one creditor on behalf of himself and others to enforce the liability of directors of a charitable organization on the theory that the corporation being insolvent and in the hands of a receiver a multiplicity of suits would be prevented. The court rested its decision on the previous decisions in *O'Brien* v. *Fitzgerald, 143 N. Y., 377; Empire State Savings Bank* v. *Board, 151 N. Y., 638; Dyckman* v. *Keeney, 154 N. Y., 483.*

In *Dykman* v. *Keeney* (*supra*) Mr. Justice Gray uses the following language:

"It is very clear therefore that we are com-

mitted by our decision in O'Brien *v.* Fitzgerald, to the view that where the action is to hold persons responsible to the receiver of a corporation for a neglectful and wrongful performance of their duties as directors and to recover the losses sustained by the corporation, the action is one at law and that something more is required to warrant the intervention of a court of equity than mere allegations showing that the acts complained of are numerous and complicated; that they are difficult of ascertainment, without a discovery with respect to them, and that a multiplicity of actions would be necessary, if all the directors, who were in office during the whole or a part of the time within which the acts complained of were committed, could not be associated as defendants in one action."

In *Washington County* v. *Williams* (*111 Fed. Rep., 801;* C. C. A. 8th Cir.) a county issued a series of bonds payable to bearer, in which it promised to pay thereon *pro rata* the proceeds of an annual tax to be levied at a certain rate upon the taxable property of the county until the principal and interest should be paid. It was held that each holder of such bonds had a separate right of action at law to recover such sum as should be due him under the terms of the bond, and that the several bondholders could not unite and jointly maintain a suit in equity for a decree establishing the validity of the bonds and a recovery of the amount due thereon on the repudiation of the obligations by the county, and that the bondholders' remedy at law was adequate and equity did not have jurisdiction of such case on the ground of a multiplicity of suits.

Other illustrations which bear on this branch of the case are afforded by the following authorities:

In *Scott* v. *McFarland* (*70 Fed. Rep., 280;* Circuit Court, District of Oregon) a bill alleged that complainant, by fraudulent representations and without consideration, was induced by a person named to execute in his favor five promissory notes; that thereafter the payee forged complainant's name to a large number of other notes like those signed by the complainant; that the defendants, fifteen in number, were severally holders of these notes, claiming to have purchased them in good faith in the usual course of business; that complainant was unable without inspection of the notes to ascertain which were the five signed by him, and which were forgeries; that a discovery was necessary for that purpose, and that the persons holding the five notes acquired them with notice of their fraudulent character. The bill prayed a cancellation of all the notes.

It was held that the case made out was not one in which equity jurisdiction could be sustained on the ground of preventing a multiplicity of suits, as there was no community of interest among the several defendants. Bellinger, J., said:

"Suits do not become of equitable cognizance merely because of their number. Equity assumes jurisdiction to prevent a multiplicity of suits where, among other cases, individual claims, not only legally separate and distinct transactions, are made against a single plaintiff; but in all such cases there must at least be a community of interest among all the claimants in the question at issue and in the remedy. The case of Louisvelle N. A. & C. Ry Co. *v.* Ohio Valley Improvement & Contract Co., 57 Fed., 42, is relied upon to sustain the jurisdiction in this case. That is a case where there was an illegal and fraudulent guaranty of several hundred bonds of a railroad company, which the complainant sought to have can-

celed. The guaranty was endorsed upon all of these bonds. These guaranties were in pursuance of a certain contract between the complainant and defendant company, the facts alleged being such as to render the guaranties made and the contract therefor illegal. Tre case involved a question or questions decisive of the validity of all the guaranties. There was therefore a community of interests among all the claimants. The case of Railroad Co. *v.* Schuyler, 17 N. Y., 592, is of the same character. The case was one of spurious certificates of stock, issued by an officer having apparent authority to do so, and outstanding in the hands of numerous holders. The bill was maintained upon the ground that the false certificates had a common ground of invalidity and so of all like cases where the jurisdiction is upheld to set aside distinct claims in separate hands held under distinct circumstances—there must be a common ground of invalidity. It is not enough that the grounds of the invalidity of the several instruments are, as in this case, similar. So far as the instruments sought to be canceled here, as forged, are concerned, the forgeries are several. The ground of the invalidity of these notes is not a common one within the sense of the cases cited. The character of one of these notes, as to its being forged, has no bearing as to the others. The questions touching the validity of these notes are as several as the holdings. There is, in other words, a multiplicity of issues of fact to be tried, which the jurisdiction invoked cannot avoid or lessen. Moreover, the validity of a portion of these notes is attacked upon the ground that they are without consideration, and that their holders took with notice. The questions here are not only distinct, but different in character from the forgeries charged as to the remaining notes; and, further, the right to recover upon these notes depends entirely upon the good faith of the several holders, and it is not claimed that any community of interest exists between the several holders as to

this. The demurrer to the bill of complaint is sustained."

To repeat, our position is that in this case there is not only an improper joinder of parties, but also of causes of action, and that there is no such connection between the parties, as warrants such a union in a single suit, any more, than though the tortious act which is complained of, had been any of the ordinary wrongs, for relief against which resort is had to the courts.

It has been suggested that the decision in *Nashville Railroad Co.* v. *McConnell* (*82 Fed. Rep., 65*) is an authority for such a joinder of defendants and of causes of action. But a reference to page 72 of the opinion shows that that proposition was not considered, but was conceded away by counsel who were over-confident as to other propositions which they discussed. Judge Clark said:

"It is agreed in order to save a larger accumulation of costs, that if the court entertains the opinion that there is jurisdiction against each defendant in a separate suit, no objection will be urged against entertaining suits against the defendants jointly."

It has further been suggested, that actions in equity have been maintained by employers against their discharged employees, who are united together for the purpose of maintaining a boycott or unlawful combination to the injury of the complainant. Those cases are entirely different from the present. There, all of the defendants are banded together, for the purpose of jointly perpetrating an injury against the complainants and their property. The very gist of the complaints in such actions is, that the defendants are by con-

certed and combined action, together committing a tortious act.

Here, there is no combination, no concert of action. Each defendant is acting on his own hook, *in competition with every other defendant,* performing disjuncted acts having no relation to any acts, however similar in character they may be, performed by any of the other defendants.

In the one case the act complained of is, the same as though seven persons together commit an assault and battery upon A. In the other it is the same as though seven different individuals, at different times and at different places, committed seven different assaults upon A.

The mere fact that there are allegations in the complaint that the defendants are conspiring together, is of no consequence. Allegations do not count. The facts must be proved, and such facts as are alleged belie the conclusion of a conspiracy. The facts that the acts complained of are similar does not make it a conspiracy. Combinations must be proven by competent evidence, and identity of procedure falls far short of proof of conspiracy. As was said by Chief Justice Fuller in *Kent* v. *Lake Superior Canal Co.* (*144 U. S., 91*): "Epithets do not make out fraud, and the averments are substantially of legal conclusions not admitted by the demurrers."

The opinion of Mr. Justice Lambert in *N. Y. C. & H. R. R. R. Co.* v. *Reeves* (*See Appendix*), already several times referred to, is very clear on this proposition.

IV.

The Circuit Court was without jurisdiction, notwithstanding the colorable averments contained in the bill that the injury sustained in consequence of the defendants' acts exceeded two thousand dollars, there being no foundation in fact in support of such averment.

Whatever the allegations of the bill may be, whenever it appears that the suit did not really and substantially involve a dispute or controversy within the jurisdiction of the United States Circuit Court, the Court will *sua sponte* dismiss the proceeding.

Williams v. *Nottowa, 104 U. S., 209, 211.*
Railway Co. v. *Swan, 111 U. S., 372, 382.*
Morris v. *Gilmer, 129 U. S., 325.*
King Bridge Co. v. *Otoe County, 120 U. S., 225.*
Farmington v. *Pilsbury, 114 U. S., 144.*
Nashua Railroad v. *Lowell Railroad, 136 U. S., 373.*
Anderson v. *Watt, 138 U. S., 701.*
Excelsior W. P. Co. v. *Pacific Bridge Co., 185 U. S., 287.*

The alleged injury to the complainant's business will, on analysis, be found to be merely a

colorable claim for the purpose of securing jurisdiction in the Federal Courts.

The relief demanded is general against the trafficking by defendants in all non-transferable tickets. Not tickets presently in existence; not tickets actually in use; but the assertion is boldly made that the Railroad Company demands protection under a threat to abandon in the future all excursion tickets for conventions which may or may not be held in the future unless the relief sought is accorded it. Protection is sought against trafficking in what has been denominated as winter excursion tickets not *in esse* and which may never be issued; for reduced rate tickets which the railroads may in the future see fit to issue; and finally, for all tickets which bear the impress of the complaint of non-transferability, whether for excursions, conventions, winter traffic, or for any other purpose. They even make bold to assert that the defendants will in the future commit crime and conspire to defraud complainants of their property by means of forgery and false representations, unless the blanket injunction applied for is granted.

It is fundamental that equity acts only where property rights are involved or threatened. There must be an actual existing tangible *res*. There must be something of which the plaintiff is deprived or has been deprived, or of which he is threatened to be deprived. The complainant does not indicate from the Record, a specific piece of property actually in existence, for which the protection of a court of equity is sought. It is asking for the protection of a business not *in esse*, but to arise in the future, and which the court will not presume will be attacked injuriously before it comes into existence.

We submit that the jurisdictional averment embodied in the bill is so manifestly fictitious as to make it legally certain that the amount of injury which it is alleged the complainant's business would suffer in consequence of defendant's trafficking in non-transferable tickets is simply a jurisdictional averment for the purpose of establishing a case for this Court, and being on its face apparently colorable, the trial court should have stayed the case, and, under the Act of 1875, dismissed the proceedings.

In *Bank of Araphoe* v. *David Bradley Co., 72 Fed Rep., 867,* Mr. Justice Caldwell said:

"But jurisdiction is not acquired by a groundless and fictitious claim, made for the sole purpose of conferring it. The jurisdiction is determined by the amount demanded by the plaintiff in good faith, and not by the damages claimed, either in the body of the complaint or in the prayer for judgment. In Bowman *v.* Railway Co., 115 U. S., 611, 613, 6 Sup. Ct., 192, Chief Justice Waite, speaking for the Court, said: 'Upon the face of this *record* it is apparent that the actual value of the matter in dispute is not sufficient to give us jurisdiction. It is now well settled that our jurisdiction in an action upon a money demand is governed by the value of the actual matter in dispute in this Court, *as shown by the whole record,* and not by the *damages claimed,* or the prayer for judgment.' * * * As was said in Hilton *v.* Dickinson, 2 Sup. Ct., 424: 'It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction; but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail.' * * *

"The fifth section of the Judiciary Act of March

3rd, 1875 (18 St., 470), was leveled especially at this abuse, and put an end to all such frauds on the jurisdiction of the Circuit Court by providing: 'That if, in any suit commenced in a Circuit Court * * * it shall appear to the satisfaction of said Circuit Court, at any time after said suit has been brought * * * *that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court*, the said Circuit Court shall proceed no further therein, but shall dismiss the suit.' * * *

"It will be ovserved that this Act is *mandatory* in its terms, and *makes it the absolute duty* of the circuit court to dismiss a suit whenever, in the progress of the case, it appears that it does not really and substantially involve a dispute or controversy within the jurisdiction of the circuit court. In Williams *v.* Nottowa, T. P., 104 U. S., 209, Chief Justice Waite, speaking for the Court, says: 'This provision of the Act of 1875 is a salutary one, and it is the duty of the circuit courts to exercise their power under it in proper cases.'

"See, to same effect Maxwell *v.* Railroad Co., 34 Fed., 286; Froelisch *v.* Express Co., 67 N. C., 1.

"Groundless and fictitious claims, obviously set up for the purpose of swelling the plaintiffs' claim, on the face of the complaint, to an amount within the jurisdiction of the circuit court, under the Act of 1875, utterly fails of their purpose. The plaintiffs' claim, as far as relates to the amount required to give jurisdiction to the circuit Court under this act, *must be made in good faith.*

"In determining whether a claim is made in good faith, or is fictitious, and made only for imposing on the court a case not properly within its jurisdiction, the plaintiff will be held to a knowledge of the well-settled rules of law; and when the actual matter in controversy is adequate in value to confer the jurisdiction, and the additional amount required for that purpose is attempted to be supplied by setting up a claim for something easily susceptible of proof, if made in

good faith, but in support of which no proof is offered and no satisfactory explanation given, or by adding a claim for which the law gives no right of action, and for which there can be no recovery, such a claim must be held to be fictitious, and to have been made for the purpose of perpetrating a fraud on the jurisdiction of the court."

There is nothing in the record tending to show that the defenants handled or disposed of any of the complainant's tickets, non-transferable or otherwise, during the period of time that the U. C. V.'s were holding their annual meetings in New Orleans, or during the period covered by the Mardi Gras festivities in 1904; and yet complainant obtained not only its temporary writ, but succeeded, upon final hearing, to have it made perpetual, carrying with the decree the burden of the costs incident to the hearing and determination of what was, at the date of the final hearing, a moot question. How would it have been possible for the complainant to have sustained any injury without having at its command proof to establish the fact? If tickets non-transferable, were disposed of by defendants and tendered for transportation, the fact would have been known to the agents and representatives of the complainant, who would at once have taken them up and demanded the payment of full fare. No proof of such a fact was attempted.

The reasoning under Point I indicates that the complainant could not have sustained any legal damage by the acts complained of in the bill.

It is further to be remembered in this connection, that there is no allegation in the bill of complaint, that the complainant has sustained damage to the extent of the jurisdictional amount as a result of the acts of any one of the defendants. It is

merely pretended, that by the acts of the defendants, conjoined, such damage has resulted.

In view of the argument under Point III it is evident that in order to confer jurisdiction, it must appear that an independent cause of action, of which the United States Circuit Court has jurisdiction both by reason of the diversity of citizenship of the parties and of the amount involved, should have been stated as against each of the defendants, each being engaged in an independent enterprise, and that it is not sufficient to show that the injury sustained by the complainant as a result of the aggregated acts of ten, fifty or a hundred ticket-brokers, equalled the jurisdictional amount.

V.

The decree of injunction awarded by the Circuit Court of Appeals, so far as it relates to non-transferable tickets, that may be hereafter issued, is in effect the exercise of legislative as distinguished from judicial power, since it undertakes to promulgate a rule applicable to conditions and circumstances, which have not yet arisen, and to prohibit the petitioners from dealing in tickets not in esse and not even in contemplation, and is, therefore, violative of the most fundamental principle of our government.

The business of ticket brokerage has been in existence as a well recognized occupation, for upwards of half a century. It has been developed in large measure by the affirmative sanction of the railroad companies as a means of extending their business. From time to time efforts have been made by the railroad companies, when their interests seemed to demand it, to destroy that industry, and appeals have been made to the legislatures of various States for prohibitive legislation. Laws have been passed in various States under these auspices. Courts have differed in opinion as to the validity of this legislation. In some jurisdictions it has been sustained; in others it has been declared violative of the organic law.

People ex rel. Tyroler v. Warden, 157 N. Y., 116.
People ex rel. Fleischman v. Caldwell, 64 App. Div., 46; affd. 168 N. Y., 671.
Allardt v. People, 197 Ill., 501.
Jannin v. State, 42 Tex. Cr. App., 631.

In the first of these cases, two several acts of the legislature of New York, which sought to prohibit the business of ticket brokerage, were declared to be unconstitutional, in that they amounted to infractions upon the liberty of the citizen. Chief Justice Parker commented on the usefulness of the ticket broker, and convincingly disposed of the several criticisms made against them.

Neither the Congress of the United States, nor the legislature of Louisiana, have undertaken to prohibit the business in which the defendants are engaged. On the contrary, they have both refused to legislate against it, although repeated attempts have been made to induce legislative action.

The answer, Rec. p. 26, shows that at the session of the legislature of the State of Louisiana held in 1902, the railway companies made such an effort amid threats that unless their wishes were enacted into law, they would not sell tickets at reduced rates; but the legislature nevertheless failed to act.

The legality of the defendants' occupation was not only recognized by the refusal of the law-making power to legislate against it, but by the

affirmative act of the State of Louisiana, and of the City of New Orleans, of licensing the defendants, and of the Federal Government of taxing their occupation so long as the War Revenue Tax of 1898 remained in force (Rec., pp. 16, 26).

These efforts at suppression of the business of ticket brokerage, have been at the instance of powerful railroads, acting with the view of thereby curtailing competition by the weaker railroads, who have availed themselves of the agency of ticket brokers, for the purpose of securing business. Having failed in the accomplishment of their purpose to thus stifle competition, owing to the unwillingness of legislative bodies to interfere with a useful business instrumentality, and of the judicial condemnation of such adverse legislation as was enacted in such important jurisdictions as New York and Illinois, the railroad companies have in recent years appealed to courts of chancery, for the purpose of securing injunctive decrees which in their essential nature are legislative.

In the earlier cases, the courts granted injunctions confined to non-transferable tickets issued for special occasions, and refrained from granting injunctions of the scope for which the respondent here contends.

Nashville, &c., R. R. Co. v. *McConnell, 82 Fed. Rep., 65.*
Kinner v. *Lake Shore, &c., Ry. Co., 69 N. E. Rep., 614.*
Pennsylvania R. R. Co. v. Beekman, 30 Wash. L. R., 715.

It was not until 1903, when the Supreme Court of Missouri, in *Schubach* v. *McDonald* (*supra*), by a divided court, and the United States Circuit Court in Missouri, in *Illinois Central Ry. Co.* v. *Caffrey* (*supra*), permitted the granting of universal and blanket injunctions of a character like that now under review, that the railway companies succeeded in evolving a new form of legislation, enacted through the medium of judicial writs.

If this innovation secures the sanction of this court, then the hitherto lawful business of ticket brokerage will be prohibited by a most simple method. Pursuing the precedent of this case, a railway company will be enabled to cite before a court, all of the ticket brokers residing in Louisiana, or New York, or Illinois, or any other State, alleging that they proposed to deal in non-transferable tickets, issued for a particular occasion then impending, and alleging further that it was or might be its purpose from time to time thereafter, and on other occasions, to issue similar tickets. An injunction like that issued in the present case would then follow, prohibiting the defendants for all time, and under all conditions from dealing in any so-called non-transferable tickets, that might at any time thereafter, be issued.

If the company should in one, five, or ten years thereafter, issue similar tickets, irrespective of the circumstances attending such issue, a ticket broker dealing therein would be cited before a court to answer a charge of contempt, and might in a summary manner, without trial by jury, be imprisoned for an alleged violation of the judicial fiat, aimed, not at a concrete case then before the Court, but at transactions which at the time of the issuance

of the decree, were not *in esse*, and scarcely *in posse*.

At the time of the institution of the contempt proceedings, the following conditions might have supervened:

(a) The decree might be in direct conflict with an act of the legislature.

(b) The legislature might after the rendition of the decree have expressly prohibited railway companies from issuing non-transferable tickets;

(c) Or it might have conferred the attribute of transferability on all tickets;

(d) Or the railway company might by its method of transacting business, have waived the condition of non-transferability;

(e) Or it might have placed its tickets in the hands of selected ticket brokers for sale, under conditions which would effectively make them transferable:

(f) Or it might have given renewed sanction to the custom which has long prevailed, of permitting such tickets to pass from hand to hand;

(g) Or the courts might eventually come to the conclusion that such conditions were contrary to public policy, or were unreasonable, and therefore void;

(h) Or the railway company might have made itself a party to an unlawful combination, which, under the ruling in *D., L. & W. R. R. Co.* v. *Frank, 110 Fed. Rep., 689*, would have induced the Court to withhold an injunction;

(i) Or legislative or constitutional limitations might have been imposed on the courts, restricting them from granting an injunction under circumstances such as are presented in the present case.

Yet, if the courts can to-day render a decree of this character, which, by its terms, is operable for all futurity, as against the defendants who are enjoined, the complainant might, in spite of future legislation, in disregard of future legal theories, or of custom sanctioned by the railway companies, insist upon the vested right secured by the decree, and subject to summary punishment a defendant violating its letter. The judicial power would be effectually shackled in advance from dealing with these defences. It would be left to the railway companies to determine arbitrarily whether, in a given case, an attachment for contempt should be applied for, while at the same time the courts would be precluded from determining as *res nova*, whether or not the circumstances would have warranted the issuance of an injunction, such as that which they would be called upon to enforce.

In its inherent nature, such a decree makes law for future cases. It does not declare it as to facts actually in controversy. It lays down a rule of future conduct. It does not adjudicate as to present rights or obligations. The Court which pronounces it, passes beyond its own orbit into that in which the legislative power moves, and by so doing imperils the safety of the governmental system of which both form a part.

This tendency of one branch of the sovereign power to encroach upon the sphere of the other has been recognized from the beginning of our national history. Washington made it the subject

of a serious admonition in his Farewell Address, where he remarks:

"It is important likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power and proneness to abuse it which predominates in the human heart is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasion by others, has been evinced by experiments, ancient and modern, some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."

This Court has found it necessary, on repeated occasions, to utter words of warning with regard to the limitations upon the powers of the Judiciary, which have been so manifestly disregarded in the rendition of the decree now under review, that their repetition is believed to be warranted.

"Our function is judicial, and not legislative."

Mr. Justice White in *Davis* v. *Elmira Sav. Bank, 161 U. S., 290.*

"The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties."

Mr. Justice White in *McCray* v. *U. S., 195 U. S., 61.*

"(Courts) have no power of legislation."

Mr. Justice Brewer in *Del Monte Min. Co.* v. *Last Chance Min. Co., 171 U. S., 66.*

"A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation."

Chief Justice Waite in *Atchison, Topeka, &c., R. Co.* v. *Denver, &c., R. Co., 110 U. S., 682.*

"If a law be judged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objection. It stops with simply passing its judgment on the validity of the act before it."

Mr. Justice Brewer in *Reagan* v. *Farmers' L. & T. Co., 154 U. S., 400.*

"It is Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several states. The courts can never take the initiative on this subject."

Mr. Justice Bradley in *Transportation Co.* v. *Parkersburg, 107 U. S., 701.*

"The courts must give effect to the intention of Congress as manifested by the statute. They cannot make, but can only declare the law."

Mr. Justice Harlan in *Burnett* v. *U. S., 116 U. S., 161.*

"While it executes firmly all the judicial powers entrusted to it (the Supreme) court will carefully abstain from exercising any power that it not strictly judicial in its character, and which is not really confided to it by the Constitution."

Chief Justice Taney in *Gordon* v. *U. S., 117 U. S., 706.*

In *Interstate Commerce Commission* v. *Brimson, 155 U. S., 9,* Mr. Justice Brewer said:

"One often declared difference between judicial and legislative power is that the former determines the rightfulness of acts done; the latter prescribes the rule for acts to be done. The one construes what has been; the other determines what shall be. As said in Cooley's Constitutional Limitations (side page 92): 'In fine the law is *applied* by the one, and *made* by the other. To do the first, therefore,—to compare the claims of parties with the law of the land before established,—is in its nature a judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law as "a rule of civil conduct"; because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated.' "

In *Pennsylvania* v. *Wheeling Bridge Co., 18 How., 440,* Mr. Justice McLean said:

"The judicial power is exercised in the decision of cases; the legislative, in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the pleadings and evidence in a case."

In *The Lottawanna, 71 Wall., 576,* Mr. Justice Bradley said:

"We must always remember that the court cannot make the law; it can only declare it."

In *Sinking Fund Cases, 99 U. S., 761,* Mr. Justice Field said:

"The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."

In the same case Chief Justice Waite said:

"One branch of the government cannot encroach upon the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

In *Calhoun County* v. *Galbraith, 99 U. S., 219,* Mr. Justice Swayne said:

"Our duty is to execute the law, not to make it."

In *Cary* v. *Curtis, 3 How., 266,* Mr. Justice McLean said:

"In this government, balances and checks have been carefully adjusted, with a view to secure

public and private rights; and any departure from this organization endangers all. We have less to apprehend from a bold and open usurpation by one department of the government, of powers which belong to another, than by a more gradual and insidious course. * * * The able men who laid the foundation of this government saw that, to secure the great objects they had in view, the executive, legislative, and judicial powers, must occupy distinct and independent spheres of action. That the union of these in one individual or body of men constitutes a despotism. And every approximation to this union partakes of this character."

In *United States* v. *Duell, 172 U. S., 589,* Chief Justice Fuller said:

"We agree that it is of vital importance that the line of demarcation between the three great departments of government should be observed, and that each should be limited to the exercise of its appropriate powers."

And finally in *Schick* v. *United States, 195 U. S., 99,* Mr. Justice Harlan said:

"There is no tendency, in these latter days, more dangerous than the assumption of one department of the government of powers that belong to another department."

In passing, attention may be called to the fact that the Constitution of Louisiana clearly recognizes the independence of the several spheres of government and the necessity of avoiding encroachment by one upon the powers of the others.

State v. *Gaster, 12 So. Rep., 740.*

It is often important to return to first principles and elementary theories, lest, in an effort to

reach a result which may answer the desires of the moment, infinite mischief may be wrought. Hence we may be pardoned for referring to authorities which may at first blush seem trite or academic.

Montesquieu says in his *Spirit of Laws*, p. 174:

"There is no liberty if the judicial power be not separated from the legislative. * * * Were it joined with the legislative the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator."

Judge Cooley, in his *Principles of Constitutional Law*, p. 44, recognizes the truth of this observation:

"The legislative power is to make laws and alter them at its discretion; the executive is the power to see that the laws are duly executed and enforced; the judicial power is the power to construe and apply the law when controversies arise concerning what has been done or omitted under it. Legislative power, therefore, deals entirely with the future, and the executive power with the present, *while the judicial power is retrospective, dealing only with acts done or threatened, promises made and injuries suffered.*"

In *Osborne* v. *Bank of the United States, 9 Wheat., 319,* Chief Justice Marshall discusses the judicial power with reference to the clause of the Constitution of the United States extending the judicial power in all cases in law and equity arising under the Constitution, law and treaties, and says:

"That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."

And he adds:

"The judicial power is exercised in the decision of cases. The legislative in the making of general regulations by the enactment of laws. The latter acts from considerations of public policy; the former is guided by the pleadings and evidence in the case. * * * Indeed, laws in courts have their origin in the necessity of rules and means to enforce them, to be applied to cases and controversies within their jurisdiction; and our whole idea of the judicial power is the power of the latter to apply the former to the decisions of those cases and controversies."

John Stuart Mill remarks in his *"Considerations on Representative Government,"* p. 326:

"That the eminently beneficial working of the judicial system in this country, as remarked by De Tocqueville, is in great measure attributable to the peculiarity inherent in a court of justice acting as such—namely, that it does not declare the law *co nomine* and, in the abstract, but waits until a case between man and man is brought before it, judicially involving the point in dispute, from which arises the happy effect that its declarations are not made in a very early stage of the controversy; that much popular discussion usually precedes them; that the court decides, after hearing the point fully argued on both sides by lawyers of reputation; decides only so much of the question at the time as is required by the case before it, and its decision, instead of being for political purposes, is drawn from it by the duty which it cannot refuse to fulfil of dispensing justice impartially between adverse litigants."

There is no distinction between courts of law and courts of equity in respect to this fundamental line of demarcation between the judicial and

the legislative power. Thus, in *13 Law Quarterly Review, p. 362,* in his article "Government by Injunction," Mr. W. H. Dunbar observes:

"Courts of equity, like courts of law, are established for the determination of controversies between individuals. The power to issue preliminary injunctions is incidental to the power to determine such controversies. The right to lay down general rules for the government of the community; to declare *ex cathedra,* in advance of any contentious proceedings, in which the question arises, what may and what may not be lawfully done, and to impose on the whole community a duty to refrain from doing a certain act, is in its entirety a legislative act. The jurisdiction of the court depends upon the existence of a case on which it is called upon to adjudicate."

In *Chartiers Coal Co* v. *Mellion, 152 Pa., 286,* the Supreme Court of Pennsylvania decided that it was for the legislature rather than for the judiciary to lay down the rules fixing the rights of the owners of the different strata of the earth in the mining regions.

In *Bates* v. *Kimball, 2 D. Chipman, 37,* the Supreme Court of Vermont sententiously declares:

"No power can properly be a legislative and a judicial power at the same time; and as to mixed powers, the separation of the departments in the manner prescribed by the Constitution precludes the possibility of their existence."

In *State ex rel.* v. *Aloe, 152 Mo., 456,* the court said that in determining the limits of the judicial power the Chancellor cannot, by excursions beyond its domain, produce conditions to make jurisdiction for itself by forestalling and anticipating facts.

Courts deal with controversies concerning legal rights when such rights are created, or come into existence; when rules of civil conduct are established by the legislative power, it is for the courts to see that they are obeyed, and it is only when the controversies arise in the determination of the legal rights and duties growing out of given circumstances in human affairs that cases can be presented for judicial cognizance. Hence arises our *case* law and the development of our jurisprudence, by the judicial determination of actual existing controversies. The uneven development of our jurisprudence growing out of its dependence upon case law and its subsequent irregular evolution is thus commented upon by ex-Judge Dillon in his Law and Jurisprudence of England and America, p. 236:

"Judicial power can, of course, be exerted only as cases arise for decision. It was entirely fortuitous, when, if ever, a given point would arise for judgment, and only such points as actually arose could be authoritatively dealt with by the courts."

He quotes from Sir Frederick Pollock's "Essays on Jurisprudence and Ethics":

"The law depends upon the casual exigencies of litigation to determine what parts of it shall be filled up and what left incomplete. * * * All kinds of curious little questions receive elaborate answers, while great ones remain in a provoking state of uncertainty."

All our courts, therefore, are limited in the exercise of their judicial power to the determination of the cases presented in the actual exigencies of litigation. As Pollock points out, we have nothing analogous to the annual edict of the Roman

Praetor, the *edictum perpetuum* issued on his taking office, announcing the system adopted by him for the decision of cases during his magistracy. We are told that these annual edicts in their announcement of principles were important factors in the development of the Roman Law. In our jurisprudence we have nothing of the kind, and we are forced to content ourselves with the exercise of the judicial power, limited to the decision of concrete cases as they arise incidentally in the course of human affairs.

These thoughts underlie the decision of this Court in *New Haven Railroad vs. Interstate Commerce Commission, 200 U. S., 404*, where Mr. Justice White forcibly denounces injunctions like that which the Circuit Court of Appeals has promulgated in this case:

"The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the Court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Company v. United States, 196 U. S., 375.* The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce that a Court shall enforce an observance of the statute against

a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *In re Debs, 158 U. S., 564*, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

In *Swift* v. *United States, 196 U. S., 375, 396, 401*, Mr. Justice Holmes, speaking of a decree granting an injunction, said:

"On the other hand, we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can. * * * The general words of the injunction 'or by any other method or device the purpose and effect of which is to restrain commerce as aforesaid,' should be stricken out. The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objections which we stated at the beginning that it was our duty to avoid."

Reagan v. *Farmers L. & T. Co., 154 U. S., 362*, *Interstate Commerce Commission* v. *Railway Company, 167 U. S., 499*, and the other so-called "Rate Cases," afford additional illustrations of the sep-

aration of the legislative and judicial functions, the judicial act of inquiring whether the rates which have been charged and collected are reasonable, being recognized as an entirely different thing from the legislative act of prescribing rates which shall be charged in the future.

The application of these principles to facts identical with those presented by the present record is convincingly treated in the dissenting opinion of Mr. Justice Valliant in *Schubach* v. *McDonald, supra* (See Appendix), and in the opinion of Mr. Justice Lambert in *N. Y. C. & H. R. R. R. Co.* v. *Reeves, supra* (See Appendix), both of which may be profitably consulted for a practical as well as a theoretical treatment of this novelty in equity jurisdiction, which is now for the first time presented to this Court.

It is also proper to call attention to the language of Mr. Justice Parlange on the rendition of the final decree in this cause, where he says in his opinion, which has been omitted from the record herein (See Appendix), after considering *Schubach* v. *Hough, supra*:

"Now it strikes me that in a case of this kind for a court to go beyond the occasion which has necessitated an application to it—for a court to go beyond the concrete cause made before it, and to undertake to extend its action in the future, and to establish as it were a rule of action in the future, and to establish as it were a rule of action binding upon the defendants, as long as they live, is a matter, to say the least, of a very serious and grave difficulty. It has been argued that it would be a great inconvenience to this railroad to have to apply to the court every time it intended to issue such tickets. That may be true. But, of course, every one will agree that inconvenience to a litigant is no reason to give him a right to which he is not entitled."

In the recent case of *Lytle* v. *Galveston, Harrisburg & San Antonio Ry. Co., decided by the Supreme Court of Texas on January 23, 1907,* the court, although following the decision of the Circuit Court of Appeals in this case as to the right to maintain a suit in equity, concluded its opinion as follows:

"But on the other hand we think that the principles we have announced, applicable to some tickets to be issued in future, but not at all. When a railroad company has determined upon selling tickets at a reduced rate for a particular occasion good for a return trip but non-transferable, and has so advised the public and placed such tickets upon sale, then in our opinion the company has the right to enjoin dealing in the enjoined tickets. In such a case there is a live issue and a threatened injury which is imminent. But when tickets of the character designated are not upon sale to enjoin dealing in such as may thereafter be issued as occasions may arise, savors of action appropriate to the legislative branch rather than to the judicial department of the state government. It seems to us that the railroad companies have an adequate and complete remedy by enjoining dealing in tickets which are on the market for sale, without interference as to those that have not been, but may thereafter be offered for sale. This sufficiently indicates, what we think a proper qualification upon an affirmative answer to the first question certified. Some of the authorities cited in support of the main proposition just discussed go further, but we are not content to follow them to their full extent."

In a subsequent case between the same parties, the court rendered a like decision, concluding with the words:

"The judgment of the District Court will be reformed so as to apply only to such tickets as were

on the market for sale at the time the judgment was rendered, and as reformed will be affirmed."

In *Nashville, &c., Ry. Co.* v. *McConnell, 82 Fed. Rep., 65*, Judge Clark, in closing his opinion, said: (p. 87):

"It may serve to clear up the situation to particularly point out that the injunction now allowed is operative against defendants only in respect to the Centennial low-rate tickets duly signed by the original purchaser in ink, and not in pencil, and not by initials; but, within these limits, it may be well if this injunction is obeyed without indirection."

While we may for the purposes of this argument assume, that a railroad company has the right to sell tickets on any conditions which are reasonable, and to impose upon those who purchase from it, such conditions, it by no means follows that a ticket broker, who is under no contractual relation to the railroad company, is thereby debarred from acquiring these tickets, or from disposing of them to any person who may desire to purchase them. At all events the act of the broker does not violate any affirmative rule of law, or any obligation which he owes to the railroad company which may have issued the tickets.

But assuming that circumstances might arise which would afford the basis of an action on the part of a railroad company against a ticket broker handling its tickets, it is difficult to understand how in anticipation of actual wrong doing on the part of a ticket broker, or more accurately speaking, in anticipation of the existence of a judicial situation, a court can grant relief either at law or in equity. Such intervention would not be judi-

cial in its nature. As well might a court grant an injunction against a grocer from selling adulterated sugar; or against a dry goods merchant from giving short measure; or a coal dealer from giving short weight. On the same theory trade unions or railroad companies might be enjoined from carrying on their operations, because it may be apprehended that in a contingency which may arise in the future they may transgress the rights of the person seeking an injunction.

Until there comes into existence some actual property right which is threatened by the defendant, no court of chancery has jurisdiction to issue an injunction the sole purpose and effect of which is to deal with a property right thereafter to come into existence. Such a potential right is a mere abstraction, which can no more be the subject of equitable cognizance than an unwritten book, or a thought unuttered, or any other ideal conception. If it were otherwise, a concrete case would be presented in every instance where an injunction is sought, based upon suggested facts, which may or may not at some future time come into existence.

Thus, a complainant might allege a contemplated purchase of real property by himself and a contemplated purchase of cattle by another, with a fear on his part that in the event that such purchases are consummated, the hypothetical cattle may trespass upon complainant's hypothetical realty; or the complainant might allege the intention of commencing farming operations on his land, adjoining a stream, which flows through mining property belonging to the defendant, and that he fears that at some time in the future, the defendant might undertake to mine hydraulically and discharge the detritus into the stream, to his injury.

Certainly such fancied grievances, lying entirely

in the distant realm of futurity, are beyond the jurisdiction of our courts as at present constituted.

Without further multiplying authorities on this proposition, attention is called to the following illustrations of recognized limitations on the power to grant injunctions:

In *Delaware & Raritan Canal Co.* v. *Camden & Atlantic R. R. Co.* (*15 N. J. Eq., 13*) it appeared that the complainants had the exclusive franchise of transporting passengers and freight by railway across the State of New Jersey between the cities of New York and Philadelphia. The defendant, the Camden & Atlantic R. R. Co., was incorporated to construct a railroad across the State from Camden to the sea, and the Raritan & Delaware Bay R. R. Co. to construct a railway from Raritan Bay to Cape Island. The defendants undertook to join these two railroads at their point of intersection, so as to form with the aid of steamboats on the Delaware River and Raritan Bay a continuous line which, by possibility, might be used for the transportation of passengers and merchandise across the State between the cities of New York and Philadelphia. It was assumed that the complainant had an exclusive franchise for transporting passengers across the State of New Jersey between these two points.

It was nevertheless held, that there being a legitimate purpose for which the defendants' roads might be constructed and used and for which a junction between them might be formed, they could not be restrained from effecting such junction merely because it might be perverted to an unlawful purpose.

In *Thomas* v. *Musical Mutual Protective Union* (*121 N. Y., 45; s. c. 8 L. R. A., 175*), it was held that courts do not sit for the purpose of determining speculative and abstract questions of law, or laying down rules for the future conduct of individuals in their business and social relations, but are confined in their judicial action to real controversies, wherein legal rights of parties are necessarily involved and can be conclusively determined. Accordingly in that case it was decided that an adjudication could not be obtained in advance as to the validity of the by-laws of an incorporated association on an application for injunction by a member who had been cited to show cause why he should not be punished for violating such by-laws, unless such punishment would subject him to irreparable injury and other adequate means of redress were not open to him. Chief Judge Ruger in the course of his opinion said:

"However desirable it may be for the members of financial, industrial and social organizations to be acquainted with the legal force and effect of rules and by-laws adopted by such societies for the purpose of regulating the conduct and action of its members, it furnishes no reason why courts should entertain jurisdiction of actions, either legal or equitable, brought for the mere purpose of obtaining such information, whether they be instituted in behalf of the member bringing the action alone, or in that of all the associates in the corporation. It is only when some injury has been inflicted on a person, or some right of property has been invaded, destroyed or prejudiced by the action of such corporation, that a member is entitled to maintain an action in the courts for redress or protection. Courts do not sit for the purpose of determining speculative and abstract questions of law or laying down rules for the future conduct of individuals in their business and social

relations; but are confined in their judicial action to real controversies wherein legal rights of parties are necessarily involved and can be conclusively determined. Bigelow *v.* Hartford Bridge Co., 14 Conn., 565."

To the same effect is the decision of the Supreme Court of Missouri in *Flint* v. *Hutchinson Smoke Burner Co., 110 Mo., 492.*

This discussion may be most appropriately closed with the notable words of Chief Justice Fuller in *World's Columbian Exposition* v. *United States, 56 Fed. Rep., 654:*

"It is not for courts of justice, in the exercise of an unregulated discretion, to remove the settled landmarks of the law."

VI.

It is respectfully submitted that the decrees of the courts below should be reversed, and the bill of complaint dismissed, with costs.

Louis Marshall,
Henry L. Lazarus,
Moritz Rosenthal,
Petitioners' Counsel.

APPENDIX.

I.

SCHUBACH *v.* MCDONALD, 179 Mo., 162 S. C., 78 S. W. Rep., 1020, 1028 (Supreme Court of Missouri, Dec. 23, 1903).

VALLIANT, J., *dissenting*:

Being unable to concur in the opinion of the majority of the Court in these cases, and regarding the principle involved as one of much importance, I feel constrained to state as briefly as I can the reasons for my dissent.

I do not question that a railroad company may, under a valid contract, issue a ticket limited to be used only by the purchaser, or that it may lawfully refuse to honor such ticket for the transportation of anyone except the original purchaser. And possibly a case might arise under such circumstances as would justify a court of equity in interfering to prevent the transfer or sale of such a ticket. No such case occurs to me now. No one doubts that the circuit court, as a court of equity, has jurisdiction to issue injunctions, and no one doubts that to prevent irreparable injury or a multitude of suits is ground for equitable relief. I am also ready to concede that if the railroad company were required to wait until a case should actually arise, before calling on the court for an injunction, the remedy would not be so convenient, far-reaching, or so absolutely destructive of the business of the ticket broker, as it is in the form given. But conceding all those propositions, I hold that no court has jurisdiction to render a judgment or decree that in effect is but the enact-

ment of a law, or to lay down a rule of conduct to take effect on a cause of action not yet arisen, or to render a judgment in advance, to be applied when the cause of action arises.

The cases made in the petitions on which the railroad companies obtained these injunctions are, in effect, that the railroad companies, in consideration of the World's Fair and other important public events that may occur in the future in St. Louis, are contemplating issuing round-trip tickets for the transportation of persons from any given point in the United States to St. Louis and return, the tickets to be non-transferable and good going and returning only for the passage of the persons to whom they are respectively issued; that each ticket is to recite on its face that it is sold at a reduced rate, and in consideration thereof the purchaser agrees not to transfer it, but that the defendants are engaged in the business of buying and selling second-hand railroad tickets, and that, in spite of the recitals on the face of the tickets, these ticket brokers are liable to buy them and sell them to persons other than the original purchasers, who will use them in payment of their railroad fares, to the irreparable injury of the railroad companies; that if the railroad companies wait until the tickets are issued, and the brokers buy them and sell them, it will be too late to obtain equitable relief, because, in the very nature of the transaction, the deed would be done before the process of the court, from buying or selling tickets that the railroad companies might thereafter issue of the character specified. At the preliminary hearing the defendants urged the proposition that there was no concrete case stated on the face of the petition, nothing to bring the judi-

cial power of the court into action, nothing to give the court jurisdiction. But the court ruled to the contrary.

When a petition is filed in the circuit court which the defendant thinks does not state a case that gives the court jurisdiction, he has no right in the first instance to a writ of prohibition to prevent that court taking cognizance of it, because that court has the first right to decide whether or not the petition states a case within its jurisdiction, and the presumption is that, if the court has not jurisdiction of the case stated, it will so decide. And even if the court should erroneously decide that it has jurisdiction, the writ of prohibition will not ordinarily issue, if the rights of the parties can be adequately protected by appeal. But when the court at the very outset not only erroneously decides that the petition is sufficient to give jurisdiction, but renders an interlocutory decree of such effect that it is destructive of the defendants' rights, beyond redress by appeal, then the writ of prohibition ought to go. That is just what the court in these cases has done. The temporary injunctions are as effective for the destruction of the rights of the defendants as would be perpetual injunctions on final decree, because, in the very nature of the proceedings, the causes would not reach the appellate court until after the public occasions mentioned in the petitions had passed. The defendants have nothing to hope for in the final hearing, because there are no facts in issue to which evidence could be addressed to change the mind of the chancellor. When the cases come on for final hearing, what issue is there to try? Will the court hear evidence to prove at the time of filing suits the railroad companies really intended

to issue the kind of tickets specified, and that they had cause to apprehend that, if they should conclude to issue them, the ticket brokers would buy and sell them? There are no issues of fact. There is nothing in the cases to try on final hearing. It it said that these injunctions can injure no one, because they are not to take effect until a concrete case arises—until one of the defendants does an act forbidden—then the injunctions cease to be mere abstract fulminations, and become concrete judgments. That is so, but the vice of it is that it is a pre-judgment of the case before it has arisen. Suppose next year a railroad company issues a ticket in the form suggested, and a broker buys and sells it, and he is arraigned before the court on a charge of contempt. He comes into court and says, "I am advised that I had a legal right to buy and sell that particular ticket, and I ask for a trial on that issue." But the court will look at the ticket, and see printed on its face that it was sold at a reduced rate and is non-transferable, and will say to the defendant: "There is nothing to try. That was settled by a judgment rendered a year ago. The only question before the court now is as to the character and degree of punishment to be inflicted." Then, if the defendant should say, "But this ticket was not issued until a year after that judgment was rendered," the answer would be: "This judgment is prospective in its character, affecting not only what has been but what may be. It establishes a rule of conduct for all time, and confers the character of *res adjudicata* upon every transaction involving the buying and selling of a round-trip railroad ticket upon which the railroad company may have taken care to have printed on its face that it was sold at a re-

duced rate, and is non-transferable." Suppose a railroad company should issue a ticket of the kind in question, and then, in order to ascertain if any one is violating the injunction, should send a detective to a broker to sell him the ticket, and send another to buy it, and the broker, so induced, buys and sells; could he not, when arraigned in court on a charge of contempt, well say: "I bought that particular ticket from an agent of the railroad company especially authorized to sell it to me, and I sold it to one in like manner authorized to buy it"? Doubtless, if he should be allowed to get that far in his defense, the court would not inflict the penalty for contempt upon him; but, giving to the decree its natural effect, the act suggested would be *res adjudicata* as well as to that transaction as to any other defense he might desire to make. It is no answer to this position to say that the court could be relied on to use its discretion to allow the defendant, when arraigned, to be heard concerning any particular defense he might have. If the court should hear him at all, it would only be *ex gratia*. If the judgment is right, he has no legal right to be heard, because it has already been prejudged that his handling of the ticket was unlawful. The only questions the judgment leaves open are, did the ticket bear those marks? and did the broker buy and sell it? If so, he is guilty. When a man buys and sells a ticket that was not in existence when the injunction was issued, and he is arraigned in court to be punished by fine and imprisonment for doing so, to say to him that he will not be heard on the proposition that he had a right to do what he did, and to inflict the penalty upon him without giving him such hearing, is to take his money and deprive him of his liberty without due pro-

cess of law, in violation of both our state and our federal constitutions. That is just what is liable to be done in these cases, if the injunctions are taken to mean what they say, and enforced accordingly. It was said in the oral argument by eminent counsel for one of the railroad companies that the business of these ticket brokers was dishonest; that they were as bad as men who keep "fence houses" where stolen goods are knowingly bought and sold. It is strange, if that is so, that the business has not been forbidden by an act of our General Assembly, or by the legislatures of many States in the Union. In the only case to which our attention has been called in which the character of the business received judicial mention, it was said by Chief Justice Parker of the New York Court of Appeals: "It is not contended that the business of ticket brokers is in itself of a fraudulent character. The business can be honestly conducted; it has been so conducted in the past by honest men engaged in it; and the most that is asserted is that there are some men engaged in the business who have imposed on the public. The same assertion can be made with equal truth of every business, trade and profession. The business of selling passage tickets continues, therefore, to be regarded as a lawful and legitimate business."

The lawmaking power of this State has not declared this business unlawful, and the judiciary has no authority to do so, yet the effect of these injunctions is to drive these men out of business, and that is the purpose avowed in the arguments of the learned counsel for the railroad companies. It is for the Legislature to declare the policy of our law, and for the courts to apply the law to particular acts after they are committed, or acts

threatening some property right when in existence. It is true, these injunctions prohibited the buying and selling of only such tickets as carry on their face certain recitals, but there is nothing to prevent the railroad companies printing those recitals on the face of all tickets, and having all of them signed by a purported purchaser; and whether the recitals are true, or the signature *bona fide*, are questions on which the broker, according to the terms of these injunctions, when arraigned on a charge of contempt, will have no right to be heard. Any fact so appearing on the face of the ticket is, as to him, *res adjudicata*. The railroad company is clothed with the power of stating the necessary facts on the face of the ticket, and any fact, when so stated, becomes, by relation back to the judgment, *res adjudicata*, and is past disputing.

As between the plaintiffs and the defendants in those suits, if the court had jurisdiction to decree as it has decreed, the decree settles the rights of the parties touching the subject adjudged, and the plaintiffs cannot by any subsequent legislation be deprived of their vested rights in the matters covered by that decree. If the plaintiffs are entitled to what those decrees essay to adjudge to them, then, as to the defendants in those suits, no power in the land can deprive them of it. Those decrees cover tickets to be hereafter issued, as well as tickets already issued, and are aimed chiefly at tickets hereafter to be issued. No one will doubt but that the General Assembly has the power to enact that all railroad tickets issued in this state shall be transferable or assignable, yet, if the court had jurisdiction to enter the decrees that it did enter in these cases (and, so far as the ques-

tion of jurisdiction is concerned, there is no difference between an interlocutory decree and a final decree; jurisdiction to grant a temporary injunction is jurisdiction to make it perpetual), then, if the General Asembly should to-morrow enact a law to the effect that all railroad tickets hereafter issued in this State should be transferable, the act would be invalid in its application to the acts of the parties to those suits relating to tickets covered by those decrees, because, if the decrees are valid, they confer on those plaintiffs, as against those defendants, vested rights, and subsequent legislation cannot destroy vested rights. But I apprehend that, if any such condition should arise, it would be held that the fault was with the court, which had gone beyond its jurisdiction, and attempted to reach into the future to adjudicate upon cases before they had arisen. Suppose our General Assembly should conclude that the business of railroad ticket brokers was detrimental to the well-being of the State, and pass an act saying that any one who should hereafter buy or sell a railroad ticket that recited on its face that it had been issued by the company at a reduced rate, and for that reason was non-transferable, should be deemed guilty of a misdemeanor, and upon conviction be punished by fine and imprisonment; would any one say that the General Assembly, in passing that act, was usurping the powers of government intrusted to the judiciary? Whatever else might be said, in questioning the validity of the act no one would say that it was not legislative in its character. No one would claim for it that it was a judicial act. Yet that is exactly the kind of act effected by these injunctions. Our attention has been called

to a bill now pending in the municipal assembly which, in its essence, copies the very words of these injunctions, and proposes to enact them into a law. Are these railroad companies appealing to the World's Fair sentiment in the municipal assembly to induce its members to usurp judicial powers, or has the circuit court assumed legislative functions? The act, in its nature, is either legislative or judicial. It belongs either to the one department of the government or to the other. It cannot be exercised by both. In the language of the Supreme Court of Vermont, "No power can properly be a legislative and properly be a judicial power at the same time; and, as to mixed powers, the separation of the departments in the manner prescribed by the Constitution precludes the possibility of their existence" (Bates *v.* Kimball, 2 D. Chip., 77).

No court of last resort has ever before laid down the doctrine that this court now announces in the majority opinion. We have no precedent for it. This I feel safe in saying, because, although we are aided by an unusually strong array of eminent counsel, representing nearly all the great railroad interests centering in St. Louis, yet they have referred us to no appellate court that has given its sanction to such a use of judicial power. The very fact that the only legislative body in the state now in session, and at all available to the purpose, is resorted to to obtain the same object these injunctions purport to accomplish, evinces a lack of confidence in the position taken by the railroad companies in these cases.

In the brief of the learned counsel for the ticket brokers is a collection of authorities sustaining every proposition they make, and demonstrating

that the interlocutory decrees granting these injunctions are legislative, and not judiciary, in their character. I am strongly tempted to quote from some of these authorities, but I have already occupied as much space as ought to be taken in a dissenting opinion.

For the reasons outlined in the foregoing pages, I respectfully dissent from the majority opinion. In my judgment, the writs of prohibition ought to issue.

GANTT, J., agrees with me in this opinion.

II.

NEW YORK CENTRAL *v.* REEVES, *et al.*, 41 Misc. Rep., 490, 491. (New York Supreme Court, Erie Special Term, October, 1903.)

LAMBERT, J.:

This action was commenced by the service of a summons and complaint in August, 1901, and an order to show cause containing a restraining clause was made returnable in eight days thereafter. The hearing thereon was continued to meet the convenience of counsel until October of that year, when the questions involved were finally submitted. The purpose of the action was to restrain the defendants during the Pan-American Exposition, held in the city of Buffalo, and ending October 31, 1901, from selling and dealing in special low rate tickets issued by the plaintiff to persons expressing a desire to attend the exposition. The decision of the motion at this time can serve no useful purpose to the parties herein involved; the question is purely academic. I have, however, been requested by counsel to indicate by formal

expression my views of the laws applicable to the question presented, and I have consented to do so in a memorandum. The defendants, something over sixty in number, are ticket brokers, sometimes known as "scalpers," permanently or temporarily transacting business in the city of Buffalo.

The complaint, after setting forth the formal allegations of incorporation, the issuing of the special rate non-transferable tickets, alleges, and these allegations are supported in a measure by the affidavit on which the order was granted, that the defendants and each of them "are engaged in business as ticket brokers or ticket scalpers, in the city of Buffalo, county of Erie, and as such maliciously, fraudulently and illegally procure from the original purchasers and other persons the return portions of said tickets from Buffalo to the initial point, and are engaged in selling the same to other persons, who, by falsely impersonating the original purchasers before the properly appointed and constituted agents of the plaintiff, and falsely pretending to be the original purchaser, are thereby enabled to use for transportation over the railroads of the plaintiff such tickets when they are not entitled to the use of same, and which, in their hands, would not be accepted for transportation but for the imposition, fraud and deception practiced by said purchasers and the defendants above set forth." It is also alleged that each and all of the defendants, with full knowledge of the character of the tickets above described and of the fact that the same were issued at low special rates on condition of being non-transferable, have engaged in the scheme and conspiracy to defraud the plaintiff and connecting

lines and to cheat the traveling public, upon whom the plaintiff depends for business, by maliciously inducing the persons, to whom such tickets were issued by the plaintiff and connecting lines, to sell the same by false and fraudulent representations, and that they are in fact transferable and good for use by others than those named therein, to purchase such tickets by false and fraudulent representations, and in many cases the sellers and purchasers of such tickets are engaged and will engage with the defendants in attempting to deceive the plaintiff and the officers in charge of its trains as to the identity of the purchasers of such tickets with the person to whom the same were issued. It is still further alleged "that the defendants had conspired, are conspiring and will conspire with many persons to the plaintiff unknown and with each other to unlawfully and fraudulently perpetrate upon the plaintiff fraud and deceit by having such tickets accepted for transportation by other persons than the original purchaser thereof, and thus entailing upon the plaintiff numerous losses and great daily damage." And still further it is alleged that "the defendants above named have conspired, are conspiring and unless restrained by this court will continue to conspire, to interchange tickets previously purchased by one or more of the defendants from the original purchaser of such ticket with one or more of the defendants who have a purchaser for such ticket, and conspire with each other to communicate the kinds of tickets in stock for sale by them, and that said defendants have banded and conspired together and are still banding and conspiring together to carry on said business of purchasing

said tickets above referred to, and thereby greatly injure and damage the business of the plaintiff and lessens its earnings and profits to the extent of at least several thousands of dollars daily and that unless restrained by the injunction of this court, the defendants will continue to engage in such business, and to purchase and resell such tickets, and to falsify the same, and to aid the purchasers thereof from them to impersonate the original purchasers and thus impose and defraud the plaintiff to its great and irreparable damage."

Do these allegations contain facts sufficient to justify the interposition of equity and the issuing of injunctive relief? It is true, of course, that the complaint contained much of what has been described in one of the light operas as "corroborative detail intended to give verisimilitude to a bald and unconvincing narrative," but the gravamen of the action is to be found in the allegations above set forth, and unless they are sufficient the motion now before the court should be denied. It is important, therefore, to an intelligent understanding of the question that we analyze the averments and see what ground is afforded for the ultimate relief demanded. In the first place we are to have in mind that upwards of sixty gentlemen, each of them engaged in a lawful business (People *ex rel.* Tyroler *v.* Warden, 157 N. Y., 116), having no connection with each other so far as appears from any facts set forth in the compact (for the conclusions of fraud, conspiracy, etc., set forth by the pleader cannot be accepted as facts), are made defendants in this action, and this court is asked to restrain them from purchasing, or in any other way getting possession of the tickets described in the complaint, or from selling the

same. The plaintiff is a railroad corporation, having all of the rights, in so far as its corporate property is involved, that belong to any member of this State. It sells a non-transferable ticket to John Doe, of the City of New York, good for one round trip from the initial point to Buffalo and return, if used within a number of days. This ticket, it cannot be doubted, under the broad definition contained in sections 4 and 12 of the Statutory Construction Law, is personal property; the contract, such as it is, and entirely independent of the rights of the parties under it, belongs to the purchaser. He may use it for the purpose of securing the transportation which it promises in accord with the agreement, or he may frame it and hang it up in his home, or he may destroy it, or give it away, or he may sell it, and the plaintiff has no interest in the matter whatever. The ticket belongs absolutely to the purchaser, and while the rights of the parties under the contract may be limited, and the plaintiff, it may be, would be under no obligation to transport any one other than the original purchaser, the provision that the ticket is not transferable relates to the rights of the parties under the contract, and not to the written evidence of such contract; the ticket itself may be lawfully and properly transferred to anyone, though the right to transportation may be limited to the purchaser under the provisions of the contract. The mere sale or purchase of the ticket does not concern the plaintiff in any degree; it has no interest in the tickets as such. All the right which it has is that which is expressed in the contract, and if the ticket is presented by anyone other than the original purchaser, if the limitation is lawful and for a good consideration, the plaint-

iff may refuse to honor the same, and may collect full fare. Obviously, if the plaintiff may refuse to honor the ticket in the hands of a person other than the original purchaser, and may exact the full cash fare, it is not damaged by the transfer of the ticket, and the mere fact that it may be difficult for the plaintiff to know whether the person presenting the same is John Doe or Richard Doe is no good reason why a court of equity should interpose and surround each ticket as it is issued with the protection of an order of the Supreme Court, not because of any unlawful act of these defendants, but because some one unknown to this action may be tempted to make an improper use of the same. In the somewhat analogous case of an action for the cancellation of written instruments it has been held that a resort to equity, to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law; or from some other special circumstances peculiar to the case, and rendering a resort to equity highly proper. And it is now well established that equity will not interpose to decree the cancellation of an instrument, the invalidity of which appears upon its face. Town of Venice *v.* Woodruff, 62 N. Y., 462-467, and authorities there cited; Town of Springport *v.* Teutonia Savings Bangs, 75 *id.*, 397-401. Assuming the limitation of these tickets to be lawful, the purchaser from one of these defendants gains no greater right in the ticket than possessed by the original purchaser, and that right was confined to his own personal transportation, and this appears upon the face of the ticket. The mere fact that the

servants of the railroad company are unable to determine whether the person presenting the same is the original purchaser would not seem to warrant interference, more than in the case of non-negotiable instruments. By the terms of the contract the original purchaser is called upon to sign the return portion of the ticket in the presence of the plaintiff's agents, and this court will not presume that anyone not a party to this action will falsely impersonate another for the purpose of working fraud upon the plaintiff. The presumption of innocence belongs to every individual, and in the absence of facts justifying the inference, a court of equity will not assume that the traveling public, or any considerable portion of it, will engage in fraudulent transactions. The plaintiff, if it can establish the fraud, is entitled to take up the ticket and to charge full fare, according to the terms of the contract, and it cannot be held as a matter of law, under the allegations of its complaint, that it will be damaged with this remedy in its own hands.

It is not to be doubted that in a court of equity all of the parties interested in a given transaction may be brought in as defendants for the purpose of a complete disposition of the matters in controversy, but in the case now before us the plaintiff undertakes to bring in as defendants persons who may be interested in any one of thousands of separate and distinct transactions, and we are clearly of opinion that the complaint is open to the objection of multifariousness. In the case of John Doe, purchasing a round trip ticket from New York to Buffalo, there is a single transaction. Any one who is connected with this transaction, who claims any rights or interests under this contract, or who

is engaged in any fraudulent transaction in respect to the same is, under the authority, a proper party to an equitable action. But where the subjects of the suit are in themselves perfectly distinct the plaintiff cannot bring into the compass of one suit such different objects, because it obliges each defendant to the unnecessary trouble and expense of a litigated question with which he has no concern. Brinkerhoff *v.* Brown, 6 Johns, Ch. 156. Multifariousness, properly speaking, is where different matters, having no connection with each other, are joined in a bill against several defendants, a part of whom have no interest in, or connection with, some of the distinct matters for which the suit is brought, so that such defendants are put to the unnecessary trouble and expense of answering litigating matters stated in the bill, in which they are not interested and with which they have no connection. Note to Boyd *v.* Hoyt, 5 Paige, 79, citing Newland *v.* Rogers, 3 Barb., Ch. 432, 20 Am. & Eng. Ency. of Law (2d ed.), 1080. The cause of action attempted to be set forth in the complaint in the matter now before us does not relate to any specific transaction; it attempts to make the plaintiff's whole business of issuing and selling Pan-American tickets a single transaction and to make parties defendant every person who may attempt to do anything in relation to the purchase or sale of such tickets. This is attempted to be justified on the proposition which has been asserted that "a bill against several persons must relate to matters of the same nature, and having a connection with each other and in which all of the defendants are more or less concerned, though the rights in respect to the general subject of the case may be distinct;" but in none of the adjudicated

cases which are controlling in this jurisdiction do we find this rule apply to a state of facts in any reasonable degree analogous to the facts herein asserted. In the case in which the rule is asserted (Brinkerhoff *v.* Brown, 6 Johns., Ch. 156) the court says that "when we consider that the plaintiffs, in the case now before me, are judgment creditors, having claims against the Genesee Co. perfectly established, and not the subject of litigation in this suit; and that the general right claimed by the bill is a due application of the capital of that company to the payment of their judgments; that the subject of the bill and the relief, and the only matter in litigation is, the fraud charged in the creation, management, and disposition of that capital, and in which charge all of the defendants are implicated, though in different degrees and propositions—I think we can safely conclude, that this case falls within the reach of that principle, and that the demurrer cannot be sustained." An examination of the authorities will show that this principle, in this State at least, has never been extended to a case such as is here presented.

In Board of Supervisors *v.* Deyoe, 77 N. Y., 219, the county treasurer had issued notes purporting to have been authorized by the board of supervisors. These notes aggregated a large amount in excess of the authority, and some thirty or more of the holders of these notes had commenced actions at law to collect the same. There were fifty or more of the holders of these notes, and on demurrer it was held that upon equitable principles it was proper to implead the holders of the notes for the purpose of having their respective rights and the liability of the country determined in one action, that the claims were of the same general

character, and the action was maintainable for the purpose of preventing the multiplicity of suits and to protect plaintiff against the hazard of a double recovery.

The same principle was involved in the case of National Park Bank *v.* Goddard, 131 N. Y., 494, 502, where the above cases were cited and approved, but in no case has it been suggested that the plaintiff might embrace within its complaint a large number of transactions, some of them not even in existence, and then bring in all of the parties who might in the future have some connection with these transactions, which might or might not be consummated, and enjoin them from doing any act which might enable some party or party unknown to work a fraud upon the plaintiff. In Strobel *v.* Kerr Salt Co., 164 N. Y., 303, it was held that different riparian owners of distinct parcels of riparian land, who have a common grievance for an injury of the same kind inflicted at the same time and by the same acts, though the injuries differ in degree as to each owner, may unite in a common action to enjoin a higher riparian owner from diverting or polluting the stream, and many cases of a similar character are to be found, and the case of Bradley *v.* Bradley, 165 N. Y., 183, is conceded to be a border line case, and affords no authority for an extension of a doctrine to reach the facts presented in the case. The case is not brought within equitable principles by characterizing the acts of the defendants, or the acts which it is assumed they are going to commit, with reference to some transactions yet to be, as "maliciously, fraudulently and illegally done," without stating facts from which this inference may be properly drawn, nor is the case strengthened by

the allegation that defendants have "engaged in a scheme and conspiracy to defraud the plaintiff," where it is not made to appear by the facts stated in what this alleged conspiracy consists. To allege that the defendants have conspired and will conspire, is to allege but a conclusion of the pleader, which is not strengthened by being sworn to positively, and if we keep in mind the fact that these alleged schemes and conspiracies are in reference to matters in a large degree which have taken no form, it will be seen that there is no ground on which a court of equity may properly take jurisdiction. It is not alleged that any of the defendants have threatened to buy or sell these tickets hereafter to be issued; there is nothing from which the court may reach the conclusion that anyone is going to purchase these tickets, or that if they do purchase them they will sell them to any of the defendants, or that if they do sell them that any of the defendants will be able to sell them, and the whole case rests upon mere assumption, based upon assumption, while all of the presumptions of law are in favor of innocence, honesty and a discharge of the duties of citizenship. The law is well settled that a mere conspiracy to cheat and defraud amounts to nothing (Brackett *v.* Griswold, 128 N. Y., 644), and if an intent to defraud is only proved by the doing of perfectly lawful acts the mere fact that such acts are charged as being done pursuant to a conspiracy is immaterial. Manning *v.* Beck, 129 N. Y., 1, 11. To sustain an action for fraud and deceit, the fraud and injury must be connected. The one must bear to the other the relation of cause and effect, and it must be seen in an appreciable sense that the damage flows from the fraud as the prox-

imate and not as the remote cause. Rothmiller *v.* Stein, 143 N. Y., 581, 588. In this case there is no direct connection between the alleged conspiracy and the supposed injury; the so-called fraudulent practices on the part of the defendants cannot result in damage to the plaintiff without the intervention of persons who are not parties to this action, and who may not be presumed to be guilty of offenses against honesty without some evidence to support such a conclusion, and this court is not bound to presume that a ticket in the hands of a person other than the original purchaser and which is limited to such purchaser will be accepted for passage upon the plaintiff's trains or that damage would result if this should happen. "I confess," says Parker, Ch. J., in the case of People *ex rel.* Tyroler *v.* Warden, 157 N. Y., 116, 123, "I am unable to see how such a sale defrauds a transportation company. If a transportation company sell a ticket from New York to San Francisco, it undertakes to carry the holder from one place to the other. It costs the company no more to carry one person than it does the other. How then can it be defrauded or in any way prejudiced by the transfer of such a ticket by the purchaser to another person?"

It is in no part of the duty of a court of equity to assume evil; it has fulfilled its functions when it has found a remedy for actual or threatened wrong for which the law furnished no adequate redress, and it cannot properly take jurisdiction where it is not shown that the wrong which is feared will probably result from the wrongful acts of the parties who are before the court, without the intervention of persons to the court unknown. So far as may be gathered from the

complaint, the plaintiff cannot suffer injury without the acts of parties who are strangers to this action, if indeed it may suffer damages at all, and where the plaintiff has reserved to itself the power of regulating the method of authenticating the ticket and of taking it up and collecting full fare where it is presented by a person other than the original purchaser, it takes a good deal of presumption against the current of law, to make out irreparable injury to the plaintiff through the acts of all of these defendants, some of whom may never have any relation to any given transaction.

We are unable to find facts which justify the interposition of equity as against a single defendant, and there is clearly no greater cause of action against all of them, because there is an entire lack of a single transaction in which all of them have an interest, or in which their rights are involved.

The motion to continue the injunction pending the trial of the action should be denied.

III.

Louisville & Nashville R. R. Co. *versus* Marcus K. Bitterman *et al.*	U. S. Circuit Court, Eastern District of Louisiana. No. 13,166.

Hon. Charles Parlange, Judge.

Memorandum of Oral Statement by the Court.

What I am about to say is not intended for the record, but only for the information of counsel at the present time. It may be though, opportunity permitting, that I shall prepare a written opinion and file it with the papers in the cause.

I have had this matter under advisement for some time. It presents considerable difficulties. It is one of those questions concerning which it is easy to understand there may be a divergence of views, and I have no hesitation in saying that in my deliberations concerning the matter, I first came to a conclusion opposite to the one which I have finally come to, and which I will now adhere to.

This cause was brought by the L. & N. Railroad Company, primarily for the purpose of preventing what has been called "scalping" of excursion tickets, containing upon their face a statement that they were not transferable, which tickets, at the time of the filing of the bill, either had been, or

were, on the point of being, issued. The tickets are described carefully in the bill. I will say now, that so far as the question of pleading is concerned, that bill unquestionably was, and is broad enough to have covered, not only an injunction against the tickets especially mentioned in the bill, but also any and all other similar tickets which in the future might be issued by the railroad company. This Court issued a temporary injunction confining it to the tickets then described in the bill. Subsequently, another occasion arose, when the railroad company either had or was about to put out other excursion tickets of the same character, and an application was made to extend the injunction to those other tickets, which was done.

Now, in the course of these proceedings, I have had occasion to express very clearly my views as to the rights of railroad ticket brokers in the premises. Those views have been reduced to writing, and are part of the record, and they are substantially to the effect that: When a railroad company issues excursion tickets at a reduced rate, which tickets state upon their face, plainly, that they are not transferrable, the railroad company will be protected by injunction in this court against dealing by ticket brokers in such tickets. Of course, I adhere to those views, and it seems to me there can be no possible doubt as to the correctness of that decision.

The only matter left open in the cause was: Whether upon final hearing, the Court should only confirm the preliminary injunction which it issued, the usefulness of which, I take it, has passed away, or should go on further, and should issue an injunction to the effect that the defendants in the

case should never at any time in the future, deal in tickets similar to those which in these proceedings they had been enjoined from dealing in. As I have said at the outset, the question is one of peculiar difficulty. There is one noticeable fact that neither the diligence of the learned counsel in the cause, nor my own efforts, have succeeded in discovering more than one case, bearing upon the matter, and that is a decision of the Supreme Court of Missouri, rendered a short time ago. The majority of the court in that case decides that this general injunction, reaching into the future, may be issued. The Court, as I remember, divided by a bare majority. The minority holds that such an injunction cannot and should not be issued. The mere fact that the matter does not further appear in the report shows that it is a novel question. There is a great deal to be said on both sides. As I have said, in deliberating, I, at first, took another view that I should not grant this general injunction, if I may so call it.

I am impressed with this consideration: It is a paramount precept of the law of injunction, that no injunction should issue unless the damage is urgent and immediate. Now, it strikes me that in a case of this kind, for the Court to go beyond the occasion which has necessitated an application to it—for a court to go beyond the concrete cause made before it, and to undertake to extend its action into the future, and to establish, as it were, a rule of action binding upon the defendants, as long as they live, is a matter, to say the least, of a very serious and grave difficulty.

It has been argued that it would be a great inconvenience to this railroad to have to apply to the court every time it intended to issue such tick-

ets. That may be true. But, of course, every one will agree that inconvenience to a litigant is no reason to give him a right to which he is not entitled. But let me briefly examine that question. Let us suppose that this Court should issue the general injunction desired. Suppose that at some time in the future it was claimed that the injunction was violated. What would the railroad company have to do? It certainly would have to come before this Court and take contempt proceedings. Now, then, it all comes down to a matter of greater convenience or inconvenience. It is simply a question between proceedings by contempt or proceedings by a new bill, which practically would be nothing. Then, as I have said before, the matter of inconvenience is to be entirely disregarded, unless this right exists.

The fact that a question is novel, is no reason why a court of equity will not grant relief if the party presenting the novel question is entitled to the relief. Still, it seems to me that when the novel question is one about which there is, to say the least, the gravest doubt, especially when, without deciding the novel question, the court can, and does protect all the substantial rights of the complainant—it appears to me that the new departure should be made by the appellate and not by the original tribunal.

My conclusion, therefore, is that in this cause the decree is not to mention—is not to provide for any injunction in the future upon cases that have not arisen.

The counsel will prepare the decree.

I will say, of course, that I know perfectly well, that this is a case which, whether it be decid-

ed one way or the other, is bound to go up to the appellate court, and under my view of the case, it is for that court, rather than for me, to make, if necessary, any departure from the plain, ordinary, conservative processes of equity.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 294.

MARCUS K. BITTERMAN, ET AL.,
Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD CO.,
Respondent.

Writ of Certiorari To The United States Circuit Court Of Appeals For The Fifth Circuit.

BRIEF ON BEHALF OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

STATEMENT OF THE CASE.

The complainant Railroad Company is a citizen of the State of Kentucky, engaged in the business of operating lines of railroad upon which are transported passengers

between New Orleans and points in Louisiana and other States reached by complainant and its connections. The parties defendant to the bill of complaint are a number of individuals, citizens of Louisiana, engaged in the business of what is commonly called "ticket scalping." Three of the defendants, Marcus K. Bitterman, Julius Mehlig, and Charles T. Kelsko, filed responsive pleadings and contested complainant's right to the relief sought.

The object of the suit was to enjoin defendants, and each of them, and his or their agents, servants, employees, etc., "from buying, selling, dealing in, or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued by orator or by any other railroad company for use over orator's lines of railway, or any part of them, which, by the terms thereof, are non-transferable, or from soliciting, advising, encouraging or procuring any persons other than the original purchaser of such tickets to use, or attempt to use, said tickets for passage on any train or trains of orator, especially including the non-transferable round trip tickets, issued for use on the occasion of the United Confederate Veterans' Reunion at New Orleans in May, 1903." Quotation is from prayer of the bill.

Although the circuit court held that complainant had a legal right to issue reduced rate non-transferable tickets; that defendants, by "scalping" such tickets, were committing wrongful acts, violative of complainant's rights and causing it irreparable injury; that the remedy by law was inadequate, and that injunctive relief was the proper remedy; yet, when it came to the final decree, it refused to give preventive relief by enjoining defendants generally from "scalping" the reduced rate non-transferable tickets which complainant was in the busi-

ness of issuing, and which defendants were admittedly in the business of buying and selling. It confined the relief accorded complainant in the final decree, rendered January 28th, 1905, to making perpetual the preliminary injunctions it had rendered during the pendency of the suit, one forbidding the "scalping" of the tickets about to be issued on the occasion of the Confederate Veterans' Reunion, in May, 1903, and the other forbidding similar wrongful acts in respect to the tickets about to be issued on the occasion of the Mardi Gras festival of 1904. So much of the relief sought by complainant as related to future issues of non-transferable tickets was denied, without prejudice to its right to seek such relief by independent proceedings on or before each occasion when it might issue such tickets.

The limitations which the circuit court thought to exist upon its power to protect a lawful business from being wrongfully interfered with and injured, are such as to defeat the very ends and purposes of equitable relief. It requires, instead of avoids, a multiplicity of suits, and goes very far towards destroying the adequacy of the remedy in equity. In order to secure a reversal of the ruling, that complainant must bring a separate suit for every particular kind of non-transferable ticket it proposes to issue, and a separate suit on every occasion when it proposes to issue any such tickets, an appeal was taken to the Circuit Court of Appeals, and the following errors were assigned. **T. p.p. 122-3:**

1. "The Court erred in refusing to grant to complainant the full injunctive relief prayed for in its bill of complaint, viz: an injunction restraining defendants, and each of them, his or their agents, servants, employes, assigns, successor or successors, and all others acting for defendants, or any or either of them, and all persons

whomsoever, although not named therein, from and after the time when they severally have knowledge of the existence of such injunction, from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portion thereof, issued by complainant, or by any other Railroad Company for use over complainant's lines of railways, or any part of them, which, by the terms thereof, are non-transferable, or from soliciting, advising, encouraging, or procuring any persons other than the original purchasers of such tickets, to use or attempt to use said tickets for passage on any train or trains of complainant.

2. "After finding, as it did, that complainant had a right to issue such non-transferable tickets, and that the action of defendants in "scalping" the same was a wrongful and illegal violation of complainant's right, causing it irreparable injury and entitling it to injunctive relief from a court equity, the Court erred in confining the final injunction to two classes of such tickets, and in refusing to give it such preventive relief by injunction as would be co-extensive with the right to be protected and the wrong and injury threatened.

3. "That the Court erred in holding that, in order to protect its right to issue said non-transferable tickets from being violated by defendants through the purchase and sale of the same in violation of the terms of the contract embodied in said tickets, complainant must institute a separate suit for injunction on or before every occasion of the exercise of said right.

4. "The Court erred in failing and refusing to include in the injunctive relief which it granted by said final decree the case of 'Winter Tourist Tickets,' which the evidence showed were being issued by complainant and were being wrongfully dealt in or 'scalped' by defendants during the pendency of the suit and at the time of the final decree herein."

Defendants took a cross appeal and assigned the following errors: **(T. p.p. 127-8.)**

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1st. "The Court erred in assuming, asserting and maintaining in this cause, jurisdiction, inasmuch as the amount involved was less than the lowest limit of this Court's jurisdiction; and the averments of the bill were fictitious, fraudulent and colorable, and made for the purpose solely of seizing the jurisdiction of this Court.

2d. "That for the cause of complaint, if any exists, as recited in the bill, the complaint has a complete and adequate remedy at law, and cannot, upon recitals of fact traversed by the answer invoke the equity jurisdiction of the United States Circuit Courts.

3d. "That it is not competent, nor within the power and authority of a Chancellor, or of the Circuit Court of the United States, to establish a rule of civil conduct, and by its judgment and decree, control in advance, those who are charged with being about to breach it, and subjecting them to punishment by contempt process, thereby exercising legislative authority and usurping the functions of a co-ordinate department of the government.

4th. "That the right to deal and traffic in railroad tickets, as brokers, is an inalienable right, that being, under the declared policy of the State of Louisiana, a legitimate business, and that any attempt upon the part of the United States Courts by writ of injunction to deny them the right to conduct the business of ticket brokers, is in violation of the Fifth Amendment of the Constitution, which guarantees to every citizen protection in the enjoyment of his life, liberty and property, and of which he cannot be deprived without due process of law.

5th. "That under the bill and answer, in the absence of proof, the case should have been determined as upon the bill and answer, defendants' answer meeting and traversing all the equities of the bill.

6th. "That the Court erred in perpetuating the instructions issued at the times recited in the motion, after its jurisdiction had been by plea and answer challenged, and there was no proof of injury to the complainant.

7th. "That the Court refused on final hearing to pass upon the plea to its jurisdiction, and the record fails to show from the evidence administered that any injury whatever was suffered by the complainant by any acts complained of as against these defendants."

The nature of questions to be decided on this writ is such as to require a rather full analysis of the bill and answer. We rely much upon the admissions and affirmative averments of the answer, and shall direct special attention thereto in the following discussion of the pleadings. We shall accordingly, in the further statement of the case, present a summary of the bill and of defendant's responsive pleadings, consisting of an answer to the whole case, of a demurrer to the whole case, and of a plea to the jurisdiction. We have mentioned defendant's pleadings in the rather unusual order of time in which they were filed.

1. THE BILL OF COMPLAINT.

Article 1 of the bill sets forth the organization of complainant under the laws of Kentucky, and its citizenship of that State; its ownership and operation of an extensive system of railways traversing nine States; its connections with other railroads, whereby it reaches all points in the United States, Canada, and Mexico, and transports large numbers of passengers to all parts of the United States, as well as to foreign countries.

Article II states that defendants are citizens of the State of Louisiana, and inhabitants of the Eastern District thereof, and are each what is known as a ticket broker, or "scalper," and are engaged in the business of buying and selling the unused portions of railroad passenger tickets, especially excursion or special rate tickets

issued on occasions of fairs, expositions, conventions and the like; and that defendants have been joined in the suit because their business and transactions complained of are in act, purpose and effect identical, and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them.

Articles III, IV, V, VI, VII and VIII relate especially to the United Confederate Veterans' Reunion then about to be held in the City of New Orleans. The bill showed the nature of such annual reunions, the immense attendance thereat, the extensive preparations and arrangements being made therefor, the necessity for special reduced rates of fare to secure a large attendance, complainant's consent, at the request of a local committee of arrangements, to make special rates and to issue special excursion tickets to those desiring to attend the Reunion, amounting to a less charge for the trip to New Orleans and return than the regular lawful and reasonable charge one way to New Orleans, the result being that all desiring to attend the Reunion and agreeing to observe the conditions atached to the tickets would be carried to New Orleans and return at a cost equivalent to one cent per mile, while the regular rate, except at a few competitive points, was three cents a mile. It was further shown (Art. IV) that the form of tickets to be used on the occasion in question was a non-transferable, reduced rate ticket, "issued account U. C. V. Reunion, 1903," good, subject to the conditions printed thereon, for one first-class passage to New Orleans and return, the going trip to begin on date of sale, and the return trip to begin leaving New Orleans not later than May 24, 1903, an extension of the final leaving date being provided for on application of the original purchaser; that among the con-

ditions on the face of the ticket, which ticket contract was signed by the original purchaser and the Company, was one that the ticket was non-transferable, and if presented by any other than the original purchaser, who was required to sign the same at date of purchase, it would not be honored, but would be forfeited, and any agent or conductor of any of the lines over which it read should have the right to take up and cancel the entire ticket, both going and return portions. A copy of the form of ticket, marked Exhibit A, was annexed and made part of the bill.

It is further stated (Art. VII) that the attendance upon the Reunion would be very large, exceeding 100,000 people, of which fully one-fourth would travel over complainant's lines of railway and make use of the round trip non-transferable U. C. V. Reunion tickets; that the large number of people to be carried by complainant on this special occasion had rendered it necessary to issue a ticket, the return portion of which would not have to be signed by the original purchasers, as it would be impracticable to secure such signatures in time to enable the owners thereof to depart when desired, and the same would be a great inconvenience and source of annoyance and expense to the people, for whose benefit such tickets were to be issued; that also, by reason of the large number of persons to be carried on this special occasion, it was wholly impracticable to have the return portions of the tickets presented to any agent of complainant in New Orleans, where the identification of the original purchaser could be properly made, and that it was equally impracticable for the train conductor or collector, while in the management of his train, and in charge of so many passengers thereon, to identify properly persons present-

ing return portions of such tickets, and at the same time give proper care and attention to the safety and welfare of such passengers and the operation of the train.

It was further alleged (Art.VIII) that complainant consented to the reduction of rates and provided for the issuance of the said non-transferable tickets in reliance upon being protected from the fraudulent dealings in such tickets by defendants after the issuance thereof, as thereafter set forth, and unless it was so protected it could not afford to make the very low rates it had consented to make, and "it cannot afford in the future, on similar occasions of conventions or other assemblies or celebrations in this city, to make reduced rates, on account of the irreparable injury, for which it has no adequate remedy at law, which will be inflicted on it by reason of said fraudulent dealings of defendants."

Article IX of the bill **(T. p. 6)** is as folows:

"That the defendants, and each of them, are engaged in the business of buying and selling the unused portions of railroad tickets, being commonly called ticket brokers or 'scalpers'; that they are accustomed to buy and sell the return coupons of non-transferable tickets, especially those sold at reduced rates for special occasions, for the express purpose, and no other, of putting them in the hands of purchasers, who will use the same to secure passage on orator's or other railroads by falsely impersonating the original purchaser, falsely and wrongfully signing his name, when such signature is required, falsely stating that he is the original purchaser, and thus by fraud and imposition deceive, impose upon and defraud orator or other railroad companies to their continuous loss, detriment and damage; that orator has frequently in the past, as, for example, on the occasion of the Mardi Gras festivals in this city, issued reduced rate non-transferable round trip tickets, and the said ticket scalpers

have always fraudulently dealt in the return coupons thereof, as above set forth, to the great and irreparable injury of orator's business."

Article X declares that complainant is informed and believes, and also knows, from past experience, and so avers, that defendants, and each of them, will, unless restrained by the Court, buy and sell the return portions of the U. C. V. Reunion tickets, and indulge in the same fraudulent practices as charged against them in the preceding article in respect to similar classes of tickets, thus defrauding complainant out of thousands of dollars.

Article XI shows:

"That, by reason of the impossibility of preventing or detecting said frauds, as herein set forth, orator will be subjected to constant and frequently repeated losses and irreparable injury (far exceeding the sum of five thousand dollars, exclusive of interest and costs), and such of the public as shall innocently purchase said tickets to pecuniary losses, as well as to great annoyance and humiliation."

Article XII declares that the additional burden cast upon complainant's conductors and collectors of distinguishing the rightful owners of the return portions of such non-transferable tickets from the pretended or fraudulent holders thereof will inevitably subject complainant to the danger of a multiplicity of suits for damages, where unavoidable errors are made by such conductors and collectors, and will unavoidably subject the public and complainant to great interruption, delay and much expense in the operation of its trains; that complainant has no means of discovering who the persons are who will so defraud it, by the purchase and use of such tickets, and who would otherwise be compelled to pay the lawful and reasonable one-way rates, which are

much higher than the special reduced rates.

Article XIII declares that complainant has no adequate remedy at law against defendants, because of the impossibility of securing evidence, establishing the facts as to said frauds, and, if such evidence could be obtained, it would necessitate a multiplicity of suits; because the injury to its business cannot be estimated or compensated in dollars and cents; and, because defendants, and each of them, are financially irresponsible, and no judgments obtained against them at law could be collected on execution; that consequently complainant has no adequate remedy at all against defendants or any of them for the frauds which they are about to perpetrate, unless they are restrained by the orders of the Court.

Article XIV **(T. p. 7)** is as follows:

"Orator further shows that at all times it is its custom and usage, and that of its conecting lines, to issue tickets at reduced rates on various occasions to the traveling public, which, by the terms thereof, are not transferable, and constitute a special contract in express terms between orator and the lines issuing the same, all other lines over which the same entitle the holder to travel, and the original purchaser thereof, whereby the said original purchaser agrees that said ticket shall not be transferred by him to any other person."

Article XV **(T. p. 8)** reads as follows:

"That the defendants, and each of them, are, and have been for some time, engaged in the business of buying and selling, and dealing in such tickets, and in soliciting and inducing the original purchasers therof to sell and transfer the same to defendants, or some of them, with the intent and purpose that such tickets shall be used, in violation of the terms thereof, by persons other than the original purchaser, with the full knowledge on the part of defendants, and each of them, that the same is a fraud upon orator."

Article XVI **(T. p. 8)** reads as follows:

"That unless orator has the injunctive relief herein prayed for, it cannot continue to make special reduced rates, as heretofore, on the occasion of conventions, Mardi Gras festivals, and other like occasions, frequently occurring,, when it is to the great material interest of this city that large numbers of visitors should attend, which attendance cannot be secured except by the issuance of special non-transferable round trip tickets as aforesaid."

Article XVII refers to the existence of Ticket Brokers' Associations for the purpose of assisting each other in disposing of non-transferable tickets.

Article XVIII alleges that the nature of the business of all ticket brokers, or "scalpers," and the methods of conducting the same are alike, all making use of the fraudulent devices and misrepresentations, charged in the bill, to dispose of non-transferable tickets, which from a large part of their stock in trade, that they are practically in a combination or conspiracy to defraud railroad companies by inducing, persuading, or misleading the traveling public to sell or buy such non-transferable ticket contracts. That injunctive relief similar to that sought in the bill had been accorded railroad companies by Courts sitting in other States of this country, and the ticket brokers have sought to evade the injunctions by ostensibly assigning their business to some other ticket broker not named in the order; that, moreover, numbers of scalpers from other places emigrate to the city where an injunction has been granted and seek to engage in the same business and thus to render valueless the process and orders of the Court; that in order to afford complete and effective relief, the restraining and injunctive orders should be broad enough to include all who knowingly do what the order of Court prohibits de-

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fendants from doing or who aid and abet defendants in violating the injunction or in defeating the object and purpose thereof.

Article XIX states:

"That the amount involved in this controversy exceeds, exclusive of interest and costs, the sum of five thousand dollars; that the value of the business which orator seeks to protect and the right which it seeks to have recognized and enforced far exceeds, in the case of each defendant, the sum of five thousand dollars, exclusive of interest and costs."

Article XX declares that complainant is without adequate or substantial relief in the premises, except by the interposition of a Court of Equity enjoining and restraining, by its writ of injunction, defendants and each of them, and all other persons, **"from doing any of the acts hereinbefore complained of."**

The prayer of the bill was for an injunction directed to defendants and each of them, his or their agents, servants, employees, assigns, successor and successors, and all others acting for defendants or any or either of them, and all other persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the entry of the restraining order and the existence of the injunction herein, "from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets, or the return coupons or unused portions thereof, issued by orator, or by any other railroad company, for use over orator's lines of railway, or any part of them, which, by the terms thereof, are non-transferable, or from soliciting, advising, encouraging or procuring any persons other than the original purchaser of such tickets, to use or attempt to use said tickets for passage on any train or trains of orator, especially including the non-

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transferable round trip tickets issued for use on the occasion of the United Confederate Veterans' Reunion at New Orleans, in May, 1903." **(T. p. 9-10.)** Then follows a prayer for a restraining order, subpoena, etc.

The allegations and prayer of the foregoing bill afford no support for the contention that the suit was simply to prevent the "scalping" of tickets issued on the occasion of the United Confederate Veterans' Reunion in May, 1903.

2. THE ANSWER.

On May 14th, 1903, Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko filed a voluminous joint and several answer to the bill. They subsequently took no testimony and filed no evidence. Reduced to a last analysis, the defence presented in the answer is that defendants have a right to traffic in reduced rate non-transferable tickets, to buy the same from the original purchasers, although this involves a violation of the ticket contract, and to sell the same to third persons to be used by them for passage on complainant's trains, although, under the terms of the tickets, such transfer operates a forfeiture of the tickets and gives no right of passage to the transferees, who can avoid payment of the regular fare only by impersonating the original purchasers.

We shall now call attention to the admissions in the answer, which, it is believed, supply all the facts necessary to support complainant's right to the full relief prayed for.

The organization, citizenship, business, connections, etc., of complainant, as set forth in Article I of the bill, are admitted in the first paragraph of the answer.

The averments of the bill in respect to the United

Confederate Veterans' Reunion, the large attendance expected, the reduced rate non-transferable tickets provided for the occasion, etc., are admitted. Paragraph VI of the answer admits "that the form of the ticket usually provided by complainant and its connections **whenever it makes so-called reduced rates as excursion rates** is substantially the form set out and described in paragraph VI of the bill of complaint; that said form of ticket purports to contain certain conditions, and purports by the terms thereof to be signed by the original purchaser; that said form of ticket purports and pretends to be non-transferable and to be conditioned that if presented by other than the original purchaser, who is supposed to sign the same at the date purchased, it will not be honored, but will be forfeited, and said proposed ticket further pretends to be conditioned that any agent or conductor on any of the lines over which it reads shall have the right to take it up and cancel the entire ticket, both the going and return portions of it; and that the form of ticket annexed to the bill of complaint as Exhibit A is the proposed form of ticket to be issued by the complainant and its connections for persons along their lines desiring to attend said Reunion of the United Confederate Veterans." It is charged, however, that the ticket conditions are impracticable, never enforced, unenforceable, unlawful and without consideration, and that the tickets are issued and bought with that understanding; that it ought to make no difference to complainant whether the original purchaser or some third person makes use of the return portions of such tickets.

Paragraph IX contains the following admissions: It is admitted that defendants are engaged in the business of buying and selling the unused portions of railroad

tickets, or what is commonly known as "ticket brokerage;" and that, in accordance with the general custom of the trade, they buy and sell the return coupons of railway tickets, "whether the same are stamped 'non-transferable' or not, for the reason that the term 'non-transferable' does not import any practical or legal meaning in the business, according to the understanding of the railways themselves, the ticket brokers, and the traveling public to whom said tickets are issued, who freely sell them to brokers, who in turn sell them to other persons desiring to use said tickets for transportation when genuine and **bona fide.**" At the close of the paragraph it is declared that "respondents do not deny" that complainant, on the occasions of the Mardi Gras festivals in New Orleans, issue reduced rate non-transferable tickets, which tickets are, by common consent and understanding, bought and sold by ticket brokers in entire disregard of the contract against their transfer.

In paragraph X of the answer, we find the following admissions:

"Respondents admit that it is their hope and expectation to buy and sell the return portions of said U. C. V. Reunion tickets, but they deny that they will solicit, induce or persuade the holders thereof to sell such return portions to respondents upon any false or fraudulent pretense or representation upon the part of respondents. Respondents admit that they, in common with the general public, have some knowledge of the character and terms of the proposed tickets, that they are informed and believe that such tickets will be issued at low rates, to induce and enable the traveling public to attend said Reunion in large numbers; that respondents expect to offer the same for sale, if they shall ac-

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quire any of said tickets, and will sell such tickets to other than the original purchasers, for such price as they are willing to pay; and that it is no concern of complainant, or its connections, or other railways, whether respondents make a profit or a loss on the proposed dealing in said U. C. V. Reunion tickets."

It is denied in various paragraphs of the answer that respondents have committed or intend to commit any fraud in connection with the "scalping" of non-transferable tickets. It is also denied that complainant will suffer any loss, damage, or injury by reason of the buying and selling of its non-transferable tickets by respondents. They deny the right of complainant to issue non-transferable tickets.

We transcribe in full paragraphs XIV and XV of the answer **(T. p. 25)**, because the admissions therein contained seem to us sufficient to make out complainant's case for an injunction against the "scalping" of reduced rate non-transferable tickets which it is in the habit of issuing so far as the case depends upon facts.

XIV.

"Respondents admit that it is the custom and usage of complainant and its connections to issue railroad tickets at reduced rates to the traveling public on various occasions, such as expositions, conventions, Mardi Gras, reunions, or other public gatherings, and that the tickets which are usually issued by complainant purport by their terms to be non-transferable, and to constitute a so-called 'special contract' in express terms between complainant, the lines issuing same, all other lines over which the same entitle the holders to travel, and the original purchasers of said tickets, whereby the said original purchasers **are forced** to agree that said tickets shall not be transferred by them to any other persons;

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but respondents show that said tickets, when issued by complainant, and its connecting lines, and other railways, on such occasions of expositons, reunions, conventions, Mardi Gras, and the like, are in practice and by general consent and common understanding of the traveling public, the railways, and the ticket brokers, when **bona fide** and genuine tickets, good for return passage over the lines of said complainant and its connections, and other railways, in the hands of the holders thereof, whether such holders be the original purchasers or not, that such practice and such understanding are common and general all over the United States; that such tickets are sold and dealt in as a legitimate business in every large city, to the knowledge of complainant, and such tickets are, and have been for many years, sold by complainant with full knowledge of the fact that they are in practice and general understanding of the traveling public, good in the hands of any holders."

XV.

"Respondents jointly and severally admit that each of them are, and have been for some time, separately engaged in the lawful business of buying, selling, and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and transfer the same to respondents, with the intent and purpose that such tickets shall be used by the second purchaser thereof; but respondents deny that such use is a violation in law or in fact of the terms thereof. And respondents deny any knowledge that such use of said tickets by persons other than the original holders is any fraud upon complainant or the railways issuing such tickets when the same are genuine and **bona fide**, and respondents again aver that it is a matter of no concern or interest to the complainant or the railways issuing such tickets, whether the original purchasers are the holders and presenters of the same, or whether the holder has purchased said ticket from the original purchaser, or whether such holder

has purchased the same from a ticket broker, or whether, as frequently happens, one of such tickets is accidentally or otherwise exchanged for another of the same class and form."

Paragraph XVI contains a denial of the allegation that complainant's willingness or ability to continue to issue special rate non-transferable tickets will be affected by the failure to receive the relief sought in this suit. Paragraph XVII denies the statements of the bill in respect to ticket brokers' associations.

We do not deem it necessary to consider the charge in the answer that complainant is not entitled to relief because it has made an illegal combination with other railroad companies in restraint of interstate commerce, for the reason that defendants offered no evidence whatsoever in support of such charge, and for the further reason that such charges, if true, would constitute no ground for denying the injunction prayed for.

Penn. R. Co. vs. Bay, 138 Fed. Rep. 203.
Penn. R. Co. vs. Beekman, 30 Wash., L. R. 715.
Kinner vs. Lake Shore Etc., R. Co., 69 N. E. 614.

3. THE PRELIMINARY INJUNCTION AGAINST THE SCALPING OF U. C. V. TICKETS.

After a hearing before the Hon. Aleck Boarman, District Judge, defendants were enjoined from buying, selling, dealing in, or soliciting the purchase or sale of the tickets, or the return coupons therof, then about to be issued on the occasion of the United Confederate Veterans' Reunion, which, by the terms thereof, are non-transferable, or from soliciting, advising, encouraging or procuring any person, other than the original purchasers

of said tickets, to use, or attempt to use, said tickets for passage on any train or trains of complainant. **(T. p.p. 35-36.)**

4. REPLICATION OF COMPLAINANT.

On December 11, 1903, complainant filed a general replication to the defendants' answer to the whole bill. **(T. p. 63.)**

The cause having been thus put at issue, the Court, on motion of solicitors for complainant, appointed Henry J. Carter, Esq., on January 9, 1904, examiner, to take testimony and evidence in the cause and to return the same into Court.

5. EVIDENCE TAKEN ON BEHALF OF COMPLAINANT.

On January 21, 1904, complainant took the testimony before the examiner of two witnesses, John K. Ridgely and George F. Cranmer. For the reasons which were indicated in the analysis of the bill and answer, and which will be more fully stated later on, it is believed that the admissions in the answer supply sufficient basis of fact to entitle complainant to the relief sought, and that no evidence on behalf of complainant was necessary. However, out of abundant precaution, the testimony of two witnesses was introduced. We do not deem it necessary to give more than the briefest summary of this evidence.

Mr. Ridgely, Division Passenger Agent, testified, among other things, that complainant was in the habit of issuing reduced rate round trip non-transferable tickets on the occasion of annual Mardi Gras festivals, and on other occasions of conventions or large public gatherings

in New Orleans; that such tickets contain a contract, signed by the purchaser, that they are not to be transferred, and were issued, as a rule, for one fare for the round trip, i. e., at one-half of the regular rate of fare. **(T. p.p. 86-87.)**

He produced forms of two classes of such reduced rate non-transferable tickets which are annually issued by complainant, i. e., Mardi Gras tickets and Winter Tourist tickets. He testified **(p.p.87-88)** that the Winter Tourist tickets were issued every winter in large quantities, and many of such tickets were, at the time he was testifying, outstanding and in use.

As to all such reduced rate non-transferable tickets, the witness declared, from knowledge derived from his experience, that they were being scalped in large numbers by "scalpers," or "ticket brokers"; that complainant had done all it could do to prevent this violation of its rights; that in innumerable cases conductors had returned to him tickets which they had taken up because scalped. **(T. p. 89.)**

As to the pecuniary damage or injury to the business of complainant, which it is the object of this suit to prevent, the testimony is as follows **(T. p. 89)**:

Q. What can you say as to the amount of pecuniary damage which the Louisville and Nashville Railroad sustains annually from the sale by scalpers of the round trip non-transferable tickets?

OBJECTION—JUDGE LAZARUS: Objected to on the ground that there is no element of damages involved in this controversy, and no claim here for recovery against the parties arising out of their dealings in tickets issued by the Company and which they acquire in the usual course of business.

A. "The scalpers succeed unquestionably in getting a large number of tickets over our line every year, running up into the hundreds, and possibly into the thousands. We have arrived at the conclusion from the large number of tickets our conductors have taken up, and I should judge that the Louisville and Nashville Railroad suffers every year from fifteen to eighteen thousand dollars, or more, every year. On this division it is almost that amount."

George F. Cranmer, a veteran conductor in the employ of defendant, explained the tricks and devices resorted to by ticket scalpers, and those who dealt with them, to make use of non-transferable tickets, and the efforts of complainant to prevent such use. As defendants made no effort to prove the averments of their answer, that complainant acquiesced in the scalping of such tickets, Mr. Cranmer's deposition is not now of much importance.

7. EVIDENCE ON BEHALF OF DEFENDANTS.

There was none of any kind.

8. DEFENDANTS' DEMURRER.

On January 23, 1904, defendants filed a joint and several demurrer to the whole bill, on the ground that the bill contained no matter of equity whereon the Court could base any decree or grant any relief to complainant, and that the case sought to be made by complainant was a moot case, and not a real controversy, and did not entitle complainant to any discovery or relief against defendants or any of them. **(T. p.p. 65-6.)**

This demurrer was filed without leave of Court, after an answer to the whole bill and a general replication and after the taking of complainant's evidence. Complainant acordingly took a rule on defendants to show cause why this demurrer should not be stricken from the files as irregularly filed, after an answer to the whole bill and without leave of Court previously obtained, or, in the alternative, to show cause why the demurrer should not be overruled as without merit. **(T. p. 78.)** After hearing, the Court, without passing upon the motion to strike the demurrer from the files, ordered that it be overruled. **(T. p. 79.)**

9. COMPLAINANT'S MOTION FOR A SECOND PRELIMINARY INJUNCTION.

On January 25, 1904, complainant took a rule on defendants to show cause why an injunction **pendente lite** should not issue prohibiting the trafficking in all reduced rate non-transferable tickets, especially including the non-transferable round trip tickets issued for use on the occasion of the Mardi Gras festivals in New Orleans. On the trial of this rule complainant read and filed in evidence as affidavits the bill of complaint, the depositions of J. K. Ridgely and of George F. Cranmer, and affidavits of Mr. Ridgely and of Mr. Charles L. Stone, General Passenger Agent of complainant. **(T. p.p. 69-71.)**

In his reasons for granting an injunction prohibiting the scalping of Mardi Gras tickets then about to be issued, Judge Parlange said that "the necessities of the defendants' case compel them to deny the validity of a contract between a railroad company and a ticket-holder, whereby, in consideration of a reduced rate, the ticket is

made non-transferable. But it is clear, beyond question, that the matter has been settled adversely to the defendants' contention." **(T. p. 72.)** The Judge went on to say **(p. 73)**: "It should be specially noticed that in this case there is no denial, but, on the contrary, an admission that the defendants deal in the class of tickets in question, and the defendants contend that they have the right to deal in them. The matter, therefore, turns mostly, if not entirely, on questions of law, upon all of which I find against the defendants."

But Judge Parlange confined the injunction to Mardi Gras tickets about to be issued on the occasion of the near approaching Mardi Gras festival, because Judge Boarman had confined his interlocutory injunction to tickets intended for use at U. C. V. Reunion. A preliminary injunction was accordingly issued, restraining and enjoining defendants, their agents, etc., from buying, selling, etc., the reduced rate non-transferable tickets, or the return portions thereof, issued by complainant on the occasion of the Mardi Gras festival at New Orleans in February, 1904.

10. DEFENDANT'S MOTION TO BE ALLOWED TO FILE A FORMAL PLEA TO THE JURISDICTION.

Nearly a year after the filing of their answer to the whole bill, after the case had been put at issue and complainant's evidence taken, defendants came into Court, on March 8, 1904, and, on suggesting in general terms "that they are now advised that this Honorable Court is without jurisdiction **ratione materiae** to hear and determine this cause and that appearers desire at this time to formally present for the Court's consideration

and decision their plea to the jurisdiction of the Court, and that until said plea to the jurisdiction shall have been disposed of by the Court's ruling, they ought to be relieved from the further defense to the cause upon its merits," obtained an order on complainant to show cause why they should not have leave to file a plea to the jurisdiction, and why, in the meantime, proceedings affecting the merits of the controversy should not be stayed. **(T. p. 80.)** In other words, after a long litigation, when the case was about ripe for a final hearing, defendants asked leave to file a formal plea to the jurisdiction which, under the rules of the Court, would have to be set down for argument upon its sufficiency or traversed and evidence taken as to the truth of its averments. No reasons were suggested by defendants, and none appeared on the face of the record, to justify the Court in permitting such a radical departure from the well established rules of pleading, and defendants' application was accordingly denied. **(T. p. 81.)**

It will be observed that defendants did not then, or at any other time, avail themselves of the privilege, conferred by the act of 1875, of calling the attention of the Court in an informal and summary way that it appeared from the evidence taken, or from affidavits furnished, that its jurisdiction was being imposed upon.

11. THE FINAL HEARING AND DECREE.

On motion of counsel for complainant, the cause was, on November 10, 1904, set down for final hearing on November 21, 1904, on which day a continuance was granted, at the request of defendants, to November 29, 1904. During all this time no suggestion was made by defendants

that the jurisdiction of the Court was being imposed upon by false or colorable statements of the amount involved, or otherwise, and no evidence of any kind was filed by defendants. Complainants relied upon the admissions in the answers, the depositions of witnesses Ridgely and Cranmer, and the exhibits offered in connection therewith. The case was argued and submitted on November 29, 1904, and the final decree was rendered on January 28, 1905.

In its final decree the Court found that the equity in the case was for the complainant and against the defendants, and that complainant was entitled to the relief which it prayed for against the defendants, so far as concerned the tickets covered by the two interlocutory injunctions previously issued, but not as to future issues of such or similar tickets. It was, therefore, ordered, adjudged and decreed that the injunction theretofore issued on the 16th of May, 1903, enjoining defndants from buying, selling, dealing in, or soliciting the purchase or sale of the U. C. V. tickets, and that the injunction theretofore issued on February 8, 1904, enjoining defendants from trafficking in Mardi Gras tickets of February, 1904, be made perpetual. It was further decreed that as to so much of the relief sought by complainant as related to non-transferable tickets to be issued hereafter, such relief be denied, without prejudice, however, to the right of complainant to seek such relief by independent proceedings on or before each occasion that it may issue such non-transferable tickets. **(T. p. 121.)**

12. THE ASSIGNMENTS OF ERRORS.

The assignments of errors by appellant and by cross-

appellants have been set forth **in extenso** in a preceding portion of this brief.

13. DECISION OF THE COURT OF APPEALS.

The Appellate Court decided that complainant was entitled to injunctive relief not only from the "scalping" of particular issues of non-transferable tickets but also from a similar unlawful dealing in the future in the non-transferable tickets which it is in the business of issuing and which defendants are in the business of "scalping". It, therefore, remanded the case with instructions to the lower court to enter a decree accordingly.

14. WRIT OF CERTIORARI.

Defendants applied for and obtained from this Court a writ of certiorari, under which the case is now here for review.

ARGUMENT.

1. THE JURISDICTION.

The jurisdiction of the Circuit Court is attacked upon the sole ground that the amount involved is less than two thousand dollars.

The object of this suit is to protect complainant's business of issuing non-transferable round trip reduced rate excursion tickets from the unlawful and fraudulent acts of defendants in buying and selling the same, inducing the original purchasers to violate their contracts with complainant and inducing and enabling the second pur-

chasers to secure transportation to which they are not entitled. The bill shows that at the time it was filed enormous crowds of people were about to attend the United Confederate Veterans' Reunion at New Orleans, thousands of whom would travel over complainant's lines upon such reduced rate non-transferable tickets. One of the objects of this bill was to prevent the scalping of this large issue of U. C. V. tickets. As shown in the analysis of the bill and answer, defendants admitted complainant's allegations in respect to the thousands of tickets to be issued and the large number who would travel thereon, and admitted their intention to buy and sell the same in disregard of the terms thereof. It was alleged (Article X of the bill) that complainant would thus be defrauded of thousands of dollars, and (Article XI) that, by reason of the impossibility of detecting and preventing the sale and resale of such non-transferable tickets, complainant would be subjected to constant and frequently repeated losses and irreparable injury far exceeding the sum of five thousand dollars, exclusive of interest and costs.

It was further alleged that complainant was in the habit or business of issuing such reduced rate non-transferable tickets on the frequently occurring occasions of conventions and other like events bringing large concourses of people to New Orleans, as well as on the occasions of the annual Mardi Gras festivals, and that defendants were engaged in the business of inflicting great loss and irreparable injury upon complainant by soliciting and inducing the original purchasers of such tickets to sell the same to defendants, who disposed of them to other persons to be used for passage on the trains of complainant. These allegations are substantially ad-

mitted in paragraphs XIV and XV of the answer. Article XIX of the bill alleges: "That the amount involved in this controversy exceeds, exclusive of interest and costs, the sum of five thousand dollars; that the value of the business which orator seeks to protect, and the rights which it seeks to have recognized and enforced, exceeds in the case of each defendant the sum of five thousand dollars, exclusive of interest and costs." **(T. p. 9.)**

The theory of the defense is that complainant has no right to issue such non-transferable tickets, that defendants have a right to buy and sell the same as they please, and it is accordingly denied that complainant can sustain any damages in the premises. If complainant's business of issuing such reduced rate non-transferable tickets is a lawful business, and if it is entitled to be protected by injunction against the interference with its business by defendants complained of, it is manifest, without any other evidence than the admissions of the answer, that the amount involved far exceeds two thousand dollars.

Defendants filed no formal plea to the jurisdiction, but simply denied, in their answer, the averments of the bill in respect to the amount of damages. Under such circumstances, proof of damages was not necessary to sustain the jurisdiction. **Butchers & Drovers Stock Yards Co. vs. L. & N. R. R. Co., (C. C. A.) 67 F. R., 35-40.** It is enough to sustain the jurisdiction—the jurisdictional facts appearing in the complaint—that it does not at any time thereafter satisfactorily appear to the Court that the suit does not really and substantially involve the jurisdictional amount. **Moffet vs. Quine, 95 F. R. p. 201.** We have, however, the uncontradicted testimony of Mr. Ridgely, a competent witness, in charge of the division

of the Louisville & Nashville Railroad Co., at New Orleans, that the pecuniary damages suffered by complainant from "scalping," on his division, of the non-transferable tickets, now sought to be protected, amounts annually to almost fifteen to eighteen thousand dollars. **(T. p. 89.)** It appears from the testimony of Conductor Cranmer **(T. p. 110)** that hundreds of Mardi Gras tickets issued by complainant are "scalped" in New Orleans every year, and that all other round trip non-transferable tickets are in like manner illegally bought and sold. It also appears that the defendants, Kelsko, Bitterman and Mehlig, are the principal scalpers in this city, trafficking in complainant's non-transferable tickets. **(T. p. 110.)**

Of course, it is immaterial how many tickets were sold by each of the individual defendants, or what was the amount of the loss each one inflicted upon complainant. Each defendant has averred that he is in the business of "scalping" all issues of complainant's non-transferable reduced rate tickets, and each one has averred his intention to continue in the business of thus preying upon complainant's business. The loss or damage which complainant may suffer from each one of defendants can be limited only to the value of the business exposed to such depredations.

Considering the magnitude of complainant's business, the admissions of the answer, the uncontradicted testimony of complainant's witnesses, the absence of any evidence whatever on the part of defendants, and the well settled principle of law that a suit cannot properly be dismissed as not involving an amount sufficient to give jurisdiction, unless the facts when made to appear on the record create a legal certainty of that conclusion, **(Put-in-Bay Waterworks Co. vs. Ryan, 181 U. S. 431)**

we submit that there is no merit in the contention that the Court below was without jurisdiction because the amount in controversy was less than two thousand dollars.

In cases of this character the value of the business to be protected determines the amount involved.

In the case of the **Texas & Pacific Railway Co. vs. Kutman, C. C. A., 54 F. R., 548, 552,** Judge McCormick said: "In a suit for injunction the amount in dispute is the value of the object to be gained by the bill. An injunction may be of much greater value to the complainant than the amount in controversy in cases of dispute which have already arisen. The maintenance of its rights is the real subject in dispute and the object of the bill, and the value of this must be considered."

In **Southern Express Co. vs. Mayor, etc., 116 F. R. 756,** it was held that where, in an action by a foreign express company, engaged in interstate commerce, against a city to restrain the enforcement of an ordinance exacting a license fee, the bill states that the value of the company's right to do business in the city exceeds $2,000, the Federal Court has jurisdiction, though the amount of the license fee is less than that amount.

In the recently decided case of **Board of Trade vs. Cella Commission Co., 145 F. R. 28 (C. C. A. 8th Circuit, April, 1906)** it was said:

"In a suit to enjoin a threatened or continued commission of certain acts the amount or value involved is the value of the right which the complainant seeks to protect from invasion, or of the object to be gained by the bill. It is not the sum he might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount. In

City of Hutchinson v. Beckham, 55 C. C. A. 223, 118 Fed. 399, a decree was sought to enjoin the enforcement of an illegal license tax imposed upon complainant's business by a city ordinance, which was being enforced by the arrest of its employe's. We held that for jurisdictional purposes the amount involved was the value of complainant's right to conduct its business without being subjected to such a burden, and not merely the amount of the tax demanded." Numerous authorities are cited.

See also **L. & N. R. Co. vs. Smith, (C. C. A.)** 128 F. R. 1, 5.

R. & A. Railway Co. vs. City of Riverside, 118 F. R., 743.

Humes vs. City of Fort Smith, 93 F. R., 857.

W. U. Tel. Co. vs. City, 56 F. R., 420.

Scott vs. Donald, 165 U. S., 107.

Foster's Federal Practice, Section 16.

There have been numerous suits similar to the one now before the Court, brought by railroad companies against ticket scalpers seeking the same relief, in which the same question as to jurisdiction has been raised, and the Federal Courts have uniformly ruled in line with the authorities above cited.

From the opinion of Judge Clark, in the case of **R. R. Co. vs. McConnell,** 82 Fed., 65, we quote as follows:

"A preliminary question is made on the jurisdiction of this Court in respect of the amount or matter in controversy. Although this question is not first presented in argument, it must first be determined in ruling on the case; for, if this Court is without jurisdiction, it is not within its province to determine the other questions raised. The contention is that these bills are substantially suits upon the ticket contracts, to recover damages for a violation thereof, or for specific execution thereof, and that the right or claims cannot be joined for the pur-

pose of making up the jurisdictional amount, as against each one of the defendants, and further, that the claims against the separate defendants cannot be joined together in this suit so as to make an amount that gives jurisdiction. It is agreed, in order to save a large accumulation of costs, that, if the Court entertains the opinion that there is jurisdiction against each defendant in a separate suit, no objection will be urged against entertaining suits against the defendants jointly. From what has been said, it will readily be seen that in my opinion these are in no just sense suits upon the contract, nor for specific performance, but are suits to protect the business of the complainants against the irreparable mischief being suffered by reason of the fraudulent use and abuse of these ticket contracts; and the amount or value of the matter in controversy is not the damage that might be specifically recovered in a suit upon any one or more of these contracts, but is the protection furnished to the plaintiffs, and the loss prevented by the fraudulent use of any and all of these void papers. **It is the value of the whole object of the suit to the complainant which determines the amount in controversy.** In **Railroad Co. vs. Ward,** 2 Black, 485, bill was brought to abate a public nuisance, and it was held that the true test of jurisdiction as to the amount was the value of the object to be gained by the bill, which object was the removal of the nuisance complained of. So, also, in **Railway Co. vs. Kuteman,** 4 C. C. A. 508; 54 Fed., 552, the suit was by a railroad company for an injunction to restrain a shipper from prosecuting in the State Courts a multiplicity of suits for overcharge in freight, the question being the right of the company to maintain a schedule rate under which the charges were made; and the Court held that the true test of the jurisdictional amount was the value of the right to maintain the rate, and not the particular sums involved in the separate suits. The exact language of the Court is:

> " 'In a suit for an injunction the amount in dispute is the value of the object to be gained by the bill.

> Fost. Fed. Prac., Sec. 16. An injunction may be of much greater value to the complainant than the amount in controversy in cases of dispute which have already arisen. **Symonds vs. Greene,** 28 Fed., 834; **Whitman vs. Hubbell,** 30 Fed., 81. The maintenance of its rates is the real subject of dispute, and the object of the bill and the value of this object must be considered. **Railroad Co. vs. Ward,** 2 Black., 485. This value not being liquidated or fixed by law, the alleged value, especially on demurrer to the bill, must govern.'

"In **Smith vs. Bivens,** 56 Fed., 352, the bill for injunction was by the owner of a large body of land, valuable only for its pasturage rights and privileges, to protect that right from use by cattle and stock owners, neighbors of the land of complainant, under authority of an act of the legislature of South Carolina, changing the previous laws which required owners of cattle and stock to keep them fenced in so as to exempt plaintiff's land, with other lands, from the operation of the act. The Court held that the true test of the jurisdiction was the value of the entire pasturage right of the complainant, which was to be protected, and not the amount as between the complainant and any one of the cattle owners proposing to use this right without compensation. Jude Simonton observed:

> " 'The case comes within **Railroad Co. vs. Ward,** 2 Black., 492, or as it is stated in **Railway Co. vs. Kuteman,** 4 C. C. A., 503, 54 Fed., 552 in a suit for an injunction, the amount in dispute is the value of the object to be gained by the bill.' "

See also **Delaware, Lackawanna Western R. R. Co. vs. Frank,** 110 Fed., 689.

It remains to consider whether the Circuit Court erred in overruling defendants' application for leave to file a formal plea to the jurisdiction of Court **ratione materiae.** Application to file this plea in abatement was made after the filing of a general demurrer and an answer

to the whole bill, and after replication and the taking of all the testimony in the case. Under the well settled rules of pleading, such an application came too late.

It was contended, however, that, under the act of 1875, such a plea can be filed at any time. Section 5 of the act of 1875 provides that if, in any suit commenced in a Circuit Court of the United States, it shall appear to the satisfaction of the Court that such suit does not involve a dispute properly within the jurisdiction of the Court, or that the parties to the suit have been improperly or collusively made or joined for the purpose of creating a case cognizable in that Court, the Circuit Court shall proceed no further therein. It is manifest, however, that defendants were not proceeding under the act of 1875, and, if they were, that they did not present any ground upon which the Court could base a suspicion that its jurisdiction was being imposed upon.

Prior to the act of 1875 no objection to the jurisdiction which defendant did not choose to set up by a formal plea to the jurisdiction filed at the proper time could be noticed by the Court, no matter how apparent it might be from the evidence or other proceedings in the cause that the jurisdictional averments were false, and that the suit had no right to be in the Federal Court. This gave rise to much abuse; the jurisdiction of the Court was frequently imposed upon, many suits being brought by collusion on merely colorable averments which were manifestly not within the cognizance of the Federal Courts. To correct this abuse, and to give the Court power to protect its jurisdiction from being imposed upon, the provision on the subject in Section 5 was enacted.

In **Hartag vs. Memory,** 116 U. S., 588, it was held

that the object of the statute was to enable the Court, on its own motion, at any stage of the proceedings, to investigate the question of jurisdiction, and upon doing so, to protect itself from fraud by a proper judgment; but that it was not the object or effect of the law to destroy the rules of pleading, and to relieve the defendant, if he wished to file a formal plea of abatement, from the obligation to do so at the proper time, and in the proper way. In commenting upon this very point, Judge Ross, ruling, as the Circuit Court did in the present case, said **(Hewitt vs. Story, 39, F. R., 160-1):**

"It is one thing for the Court, in the interest of justice and in the exercise of the power conferred, and duty imposed upon it by the act of 1875, whenever it has reason to suspect that its jurisdiction is being imposed upon, of its own motion to cause the necessary inquiry to be made to the end that all further proceedings may be stopped, and the suit be dismissed in the event it should be found that a fraud upon its jurisdiction has been committed, and quite another thing for parties to interpose pleas out of the regular and established order of proceedings. .....That parties have a right, after answering to the merits and permitting testimony to be taken, thereby entailing expense upon the opposite party and consuming the time of the Court and its officers, to interpose a plea to the jurisdiction which, from its nature is a matter to be first disposed of, and which, under the long established practice should be interposed before answer to the merits, seems to me out of all reason. Such a practice should never be tolerated in the absence of a statutory requirement, for it would lead to unnecessary expense to the parties, and to great uncertainty, delay and inconvenience in the proceedings of the Court."

The Judge goes on to say that he finds nothing in the

act of 1875 that such a plea may be filed at any time.

There is nothing, we submit, in the act of 1875, or in the cases construing it, to support the contention that a defendant, after a general demurrer, after answer to the merits, after the taking of testimony has begun, may file a formal plea to the jurisdiction, which, under the rules of the Court, will have to be set down for argument as to its sufficiency or formally traversed and evidence taken as to the truth of its averments. The extent of defendants' right is the privilege of calling the attention of the Court, in an informal and summary way, that it appears from the evidence taken, or from affidavits furnished, that its jurisdiction is being imposed upon. If a satisfactory showing is made, the Court may stop further proceedings and, after notice to the other side, order an investigation, if necessary, and protect itself from fraud by proper judgment. In this way the Court's jurisdiction is protected, and at the same time the Court and the other side are protected from being imposed upon by frivolous and unfounded attacks upon the jurisdiction, made out of the proper order, for purposes of delay. As already shown, defendants did not proceed under the act of 1875, and nothing was or could have been brought to the attention of the Court to justify action under the Statute.

We desire to supplement the foregoing argument, which was presented to the Court of Appeals, by the following:

It will be remembered that, after a general demurrer had been filed and overruled, and after answer and replication and the taking of all the evidence, defendants came into court and asked for leave to file a formal plea to the jurisdiction. They did not call the attention of the Court

to any defect of jurisdiction appearing in the record, nor did they file any affidavits or make any representations to show the Court that its jurisdiction was being imposed on. They made no showing to justify the Court to exercise its powers under the act of 1875, nor did they ask the Court to exercise its powers under that statute, and suspend proceedings pending an investigation under the direction of the Court to ascertain whether its jurisdiction was being imposed upon. The defendant did not proceed under the act of 1875. They merely sought leave of the Court to file a formal plea in abatement long after the proper time when, under the rules of pleading, such a plea should have been filed.

Now, there are several ways in which a defendant may urge a defect in jurisdiction by reason of the amount involved.

(1) He may file a formal plea of abatement. But this he must file *in limine*. He loses or waives his right to this mode of procedure by acting as defendants did in this case, that is by filing a general demurrer and answer and waiting until after replication and taking of evidence before offering to file his plea to the jurisdiction.

(2) A defendant may deny, in his answer, the jurisdictional averments in the bill, and aver that the amount really involved is below the lower limit of the Court's jurisdiction. But when the objection is made in this way, the burden of proof rests upon defendant. If the proper jurisdictional averments appear in the bill, in the absence of proof to the contrary, the jurisdiction will be maintained. 1 Foster's Fed. Prac., S. 16, pp. 56-7; *Butchers' and Drovers' Stock Yards Co. vs. L. and N. R. Co.* (C. C. A., 6 Cir.), 67 F. R., 35, 40; *Pine vs. Mayor, etc.*, 103 F. R. 337; *Adams vs. Shirk et al.*, 117 F. R. 801; *Moffet vs.*

Quine, 95 F. R. 199; *Pennsylvania Co. vs. Bay*, 138 F. R. 203.

In *Butchers' & Drovers' Stock Yard Co. vs. Louisville & Nashville R. R. Co.* (C. C. A., 6th Circuit), 67 F. R. 35, 40, the suit was for a mandatory injunction to compel the defendant railroad company to give complainant equal facilities with others for receiving and shipping cattle. It was alleged that the damage suffered by the denial of such facilities was irreparable and exceeded $2,000. This was denied in the answer, but no formal plea to the judisdiction was filed. *No proof was made of the pecuniary damage sustained. Held*, that, in the absence of a plea to the jurisdiction, an objection to the jurisdiction could not be sustained.

To the same effect is *Pine vs. Mayor, etc., of New York*, 103 F. R. 537, a suit to enjoin interference with a water right. The syllabus correctly states the conclusion of the court as follows:

> "In the absence of a plea to the jurisdiction of the Circuit Court, an allegation in the bill that the amount of damages exceeds $2,000, though denied by the answer, is sufficient, *in the absence of proof*, to give the court jurisdiction. Hence, a finding of the amount of damages is unnecessary to sustain the jurisdiction."

Moffet vs. Quine, 95 F. R. 199, was a suit to enjoin defendant from tearing down a flume used in connection with certain water rights in carrying on complainant's lumber business. On final hearing, defendant contended that the complaint should be dismissed for want of jurisdiction, "upon the ground that it did not appear from the evidence that the amount in controversy was of a value exceeding $2,000." (P.199.) The Court held "that

it is enough to sustain the jurisdiction that the complaint shows the amount in controversy to exceed in value the sum of $2,000, and that the contrary of this does not appear to a legal certainty from the evidence." (P. 200.)

In *Barry vs. Edmonds,* 116 U. S. 550, held, that a suit cannot properly be dismissed as not substantially within the jurisdiction of the court, on account of the amount involved, unless the facts, when made to appear on the record, create a legal certainty of that conclusion.

In *Stilwell-Bierce, etc., Co. vs. Williamstown, etc., Co.,* 80 F. R. 68, 69, it is said that, "when it is necessary in order to ascertain the amount in controversy to consider conflicting testimony, or to decide disputed questions of law, this necessity alone gives the court jurisdiction. The court, under such circumstances, must hear the cause and reach its conclusion judicially; in other words, must take jurisdiction."

In *Wetmore vs. Rymer,* 169 U. S. 115, a case of ejectment, a decision by the Circuit Court that the land in dispute was not of sufficient value to give jurisdiction was reversed, the court saying (p. 128), "that a suit cannot properly be dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts made to appear on the record, create a legal certainty of that conclusion."

In Foster's Federal Practice, Section 16, pp. 56-7, we find:

> "It has been said that the burden of proof that the matter in dispute is less than the jurisdictional amount, when the pleading alleges that fact, rests upon defendant; should be set up by plea in abatement, and is waived by an answer to the merits."

To same effect see *Adams vs. Shirk et al.*, 117 F. R. 801.

That the requisite jurisdictional facts appear in the bill cannot be questioned. It is true that defendants did deny in their answer that there were involved damages equal to $2,000, or in any sum. But they offered no evidence on the subject, and hence, under the authorities cited, their denial amounts to nothing and their attack upon the jurisdiction must fall.

We have already called attention to the well settled rule that, in cases of this kind, the value of the business to be protected determines the amount involved.

(3) The third method of presenting an objection to the jurisdiction is afforded by Section 5 of the Act of March, 1875. It is there provided that if, at any time, in any suit commenced in a Circuit Court of the United States, it shall appear to the satisfaction of the court that such suit does not involve a dispute properly within the jurisdiction of the court, the court shall proceed no further therein, but shall dismiss the suit.

This statute does not destroy the rules of pleading in reference to the time and manner in which formal pleas of abatement must be filed. It does permit the defendant, at any stage of the proceedings, to call the attention of the court, in an informal and summary way, that it appears from the evidence taken or affidavits furnished, that the case before it is not within its jurisdiction. If a satisfactory showing is made, the court will suspend proceedings, and, after notice to the other side, direct an investigation, if necessary, and protect its jurisdiction by proper judgment. This is very different from giving defendant a right to interrupt proceedings by filing at any stage a

formal plea to the jurisdiction which must be set down for argument as to its sufficiency or traversed and evidence taken as to its truth.

See *Hartag vs. Memory,* 116 U. S. 508; *Hewitt vs. Story,* 39 F. R. 160-1, and authorities *supra.*

The object of the statute of 1875 is to authorize the court in cases where the defendant fails to file a plea to the jurisdiction, to protect its juridiction by dismissing, at any stage of the proceedings, a suit which it finds to have been improperly brought in the Federal Court. In the exercise of this power, the court acts on its own motion, or on the suggestion of counsel. It acts on its own initiative whenever it has reason to suspect from any cause that its jurisdiction is being imposed upon. It acts on the suggestion of counsel when the latter brings to its attention, by reference to the record or to the evidence, or to affidavits furnished, sufficient to justify the belief or create a suspicion that the case has no business in the Federal Court. In neither case is the filing of a formal plea to the jurisdiction necessary or proper. That mode of procedure, necessitating observance of the delays and formalities prescribed in the rules of equity for the disposition of such pleas, would be cumbersome and productive of much inconvenience, expense and delay, and is, therefore, wholly unsuited for the testing of a question which may be raised at any time, and perhaps repeatedly, during the trial. Nor is the court bound to suspend proceedings and institute an inquiry as to its jurisdiction whenever defendant choses to suggest a want of jurisdiction. This would cause intolerable delays. Some satisfactory showing must first be made, some reason for doubting the jurisdiction, appearing either on the record or by the evidence in the case, or from affidavits fur-

nished, must be shown to exist, before the court can be expected or required to interrupt the orderly trial of the cause, and subject the parties to the delay and expense of a trial of the question of jurisdiction.

Now, whether defendants' application for leave to file a plea to the jurisdiction be regarded as an application to file a formal plea of abatement long after the right to do so had been lost, or whether it be treated as an application to the court to exercise its powers under the Act of 1875, it was clearly without merit, because unsupported by any showing giving rise to the slightest suspicion that the case was one not properly cognizable in the Federal Court.

II. THE ALLEGATIONS OF THE BILL, THE ADMISSIONS OF THE ANSWER, AND THE EVIDENCE OF COMPLAINANT MAKE OUT A CASE FOR INJUNCTIVE RELIEF.

The magnitude of the evil which complainant seeks relief from cannot be exaggerated. Its existence is not only a constant source of loss and irreparable injury to the railroad company, but it tends to discourage the issue of reduced rate tickets and necessitates the imposition of restrictions upon the purchase and use of such tickets when issued which cause great inconvenience and annoyance to the traveling public. It requires no argument to convince any one of the deterrent effect of ticket scalping upon the willingness of a railroad to put into effect occasional special excursion rates. It is also manifest that if the depredations of the ticket scalper did not have to be guarded against, the issuance of reduced rate tickets woud be a very simple matter, and signature tickets, validation agencies, and possibly joint agencies, and many

other annoying restrictions might be entirely dispensed with.

The evil influence of the scalper upon rates was pointed out by the Interstate Commerce Commission **(4 Int. Com. Rep., 390)** in the following language:

"But indirectly this diminution of revenue is made up by the public, for, while the business continues, the carriers have it in mind in making their rates, and charge higher rates than would be necessary for a fairly remunerative revenue if there were no such drain upon them to support the auxiliary force of scalpers.

"The business is, therefore, hurtful, both to the railroads and to the public in a financial sense, and the extent of the injury it is scarcely possible to measure."

Considering the essential nature of the ticket scalping business, it is not surprising that reports of decided cases abound in the strongest denunciations of its methods and purposes. In order to successfully carry on his second-hand goods business, a ticket broker or scalper must play the part of a "fence," buying from those who act dishonestly in selling, and selling to those who act dishonestly in making use of what has been sold to them. He can thrive and make a profit only by dealing in non-transferable tickets which are issued at less than the regular rates. Other tickets can be purchased over the counters of the railroad companies at the regular rate, and unused portions can be redeemed at the office of the issuing company. Special reduced rate tickets, where the sum of the locals exceeds the round trip reduced rate made by the railroad company, are the tickets which the scalper can handle with profit. That fraud and deception are necessarily involved in the purchase and sale of such tickets, is manifest.

The Interstate Commerce Commission has more than once declared that the ticket brokerage business is based on fraud and deception.

The evils of the ticket scalper's business is nowhere so clearly and fully shown as in the McConnell case, 82 Fed. Rep., 65, which has been cited elsewhere in this brief, and quoted from on other points. In an exhaustive and carefully considered opinion, Judge Clark gives a clear and unbiassed statement of the essential nature of the ticket scalper's business. This case has been cited and followed in all other similar cases that have arisen since it was decided, and is the leading case on the subject. After detailing the general methods of scalpers and disposing of the usual contention that their business is in the public interest, etc., etc., the Court refers to several authorities relating to the ticket brokers' business in general, and says:

"Just before passing away from this point, it may not be inappropriate, in view of the suuggestion made, to remark that the question of whether the ticket scalpers' business is one of public good, is not a new question, and the view I take of this particular branch which is now under consideration, is by no means a new view on the same subject. The highest authorities in the country, both legislative and judicial, have examined this business, and have pronounced judgment upon it. The Interstate Commerce Commission, its annual report for 1896, after a study of the subject extending over some years, referred to ticket brokerage in terms as follows:

> " 'In our last annual report we took occasion to comment, with some severity, upon the unlawful practices of a considerable class of persons who engage in the unauthorized sale of interstate passenger tickets, and who are commonly referred to by the

expressive name of "scalpers." What was then said is, in part, as follows: We deem it a special duty to call your attention to the persistent survival and continued increase of the illegitimate business known as "ticket brokerage," or "scalping." So far from showing any signs of diminution, it appears to be steadily enlarging in scope and volume. It is impossible to give any reliable estimate of the number of persons who take advantage of this means of procuring unlawful transportation, but it is evident that considerable percentage of railroad passenger travel is accomplished through the medium of tickets bought at reduced rates of so-called "brokers." In every city and in many of the smaller towns, offices are to be found whose proprietors sell railroad tickets to very many points at much less than the published tariffs. The streets are placarded with alluring advertisements, incoming and outgoing travelers are openly solicited, while in hotels and other public places, and not infrequently in regular railroad stations, the runners and agents of these clandestine dealers invoke participation in transportation bargains, which, upon their face, to give them no harsher term, are an obvious evasion of the law. This disregard of law to which we thus referred, has apparently continued during the current year, and assumed still greater and more serious proportions. This illegitimate traffic has become a positive scandal, and decisive measures should be taken to put an end to these illegal transactions. The remedy for this evil is easily found. A simple enactment would be sufficient, in our judgment, to prevent these abuses and effectually check this species of misconduct. We, therefore, recommend that it be made a penal offense for any person to engage in the business of selling interstate passenger tickets, unless he is an authorized agent of the carrier duly constituted such by written appointment, and that every such person be required, under appropriate penalty, to expose in his place of

business a certificate of his authority. We also call attention to the fact that extensive frauds upon the public are accomplished by the printing and sale of counterfeit tickets. It has come to our knowledge that hundreds of innocent persons have been victimized by the purchase of spurious tickets from those whose identity could not be clearly established after the fraud was discovered. The actual money loss thus resulting to unsuspecting travelers amount to a considerable sum, while the distress and annoyance to which innocent persons have been subjected, because they have been induced to purchase these sham tickets, can be easier imagined than described. It is a defect in the Federal Statutes that the counterfeiting of railroad tickets is not made a criminal offense, and we earnestly recommend the correction of this defect by an appropriate enactment.' "

After calling attention to the legislative enactments against ticket brokerage in various States, it is said:

"In **Minnesota vs. Corbett,** 57 Minn., 345, 59 N. W., 317, the Supreme Court of Minnesota held such legislation valid; and in the progress of the opinion, referring to the scalpers' business, the Court said:

" 'With these elementary propositions in mind, we proceed to consider the evils, or supposed evils, which the Legislature designed to remedy, and the measures which they have adopted to accomplish that end. It was commonly asserted and believed (to what extent correctly, is not important) that spurious and stolen tickets, and tickets which had expired by limitation, or that were not transferable, were often put on the market to such an extent as to work great frauds upon both the public and the carriers; that frequently those selling such tickets were irresponsible, so that the party defrauded had no

redress; that the business of trafficking in such tickets often furnished an inducement to railway employees to steal tickets, or issue spurious ones, and put them on the market. It was also commonly believed that in order to evade statutes designed to secure uniformity of rates and to prevent discriminations, some carriers of passengers were in the habit of placing blocks of their tickets with scalpers, ostensibly not their agents, for sale at cut rates. To remedy these and similar abuses, this statute was passed. That all its provisions have some relation to, and tendency to accomplish this end is quite clear. Do they transcend any constitutional limitation upon legislative power? It seems to us that most of the objections to the act—certainly the first two—are based upon a radical misconception of its provisions, and of the character of transportation tickets as property. Counsel for the defendant seems to assume: First, that such tickets are vendible, chattel property, which are the legitimate subject of barter and sale, the same as any other chattels; and, second, that this statute is designed to be a "license law," in the ordinary sense of that term. With these two premises assumed, the task of successfully assailing the validity of the act is a very easy one. While a railroad ticket is, in one sense, property, yet it is not merchandise or chattel. It is merely the evidence of the contract of the carrier to transport the holder between the points, and on the condition therein named. Treating it as a contract itself, it is in the nature of a chose in action. No one with whom a carrier has any inherent constitutional right to insist that it should be assignable. At common law, all choses in action were non-assignable, and if the Legislature had deemed it necessary, in order to prevent the supposed evils to provide that all transportation tickets should be non-transferable, or even to prohibit the issue of tickets altogether, and require

carriers of passengers to collect fare in cash, we fail to see why they had not the power to do so.'

"If the contention that ticket brokerage is beneficial to the public in any sense can be made good, it is necessary to discredit this legislation and the opinions of these great tribunals. That such legislation was enacted, and the judgment of the Courts pronounced, only after the most thorough examination and study of the subject, will readily be conceded. Whatever future investigation or study of the subject may disclose as to the ordinary business of the ticket scalper, and whatever may be the final word in any State as to such business, it is certain that methods of the kind which form the subject of the present suit can never be justified from any standpoint of public or private good; and, if by such methods the entire business, in all of its branches, is brought into such disrepute as to demand total suppression, it will only make manifest the repetition of history in the end which has come to all such practices."

Under **In Re Passenger Tariffs and Rate Wars,** 2 Interstate Commerce Reports, 527, the Commission exposes the evils in the ticket broker's business, and again in its third annual report, page 311, and in 4 Interstate Commerce Reports, pages 389 to 397, where attention is again called to the essentially wrongful nature of the business and a report given of a widespread investigation made by the Commission.

In the case of **Samuelson vs. State,** decided by the Supreme Court of Tennessee in June 1906, and reported in 95 S. W. Rep. 1012, it was said, p. 1016:

"That the sale as well as the purchase of non-transferable passage tickets is a fraud upon the carrier and the

public, the tendency of which is the demoralization of rates, has been settled by the general consensus of opinion among the courts."

The legislatures of many States have appreciated the unlawful and fraudulent character of the ticket scalpers' business, and statutes have been enacted making their dealing in these tickets a violation of the criminal law in the following states, viz: Pennsylvania, New Jersey, Illinois, Indiana, Minnesota, Georgia, Maine, Texas, N. Carolina, Tennessee, N. Dakota, Oregon, Montana, Florida and New York. Such laws have been held constitutional by the courts of last resort on the broad question of the right of the scalpers to buy and sell these tickets without the authority of the railroad company issuing them, in all those states in which the question has been raised, with the exception of New York.

Fry vs. State, 63 Ind. 552.

Burdick vs. People, 149 Ill. 600.

State vs. Corbett, 57 Minn. 345—59 N. W. Rep. 317.

Jannen vs. State, 42 Tex. Cr. Rep. 631—51 S. W. 1126.

Commonwealth vs. Keary, 198 Pa. St. 500—48 Atl. Rep. 472.

State vs. Bernheim, 19 Mont. 512—49 Pac. Rep. 441.

Ex Parte O'Neil, Sup. Crt. Wash. 83 Pac. Rep. 104.

Samuelson vs. State (Tenn.) 95 S. W. Rep. 1012 (June, 1906.)

State vs. Thompson (Ore.) 84 Pac. Rep. 476 (February 1906.)

State vs. Manford (Minn.) October Term, 1905.

While this is the first case of the kind to reach a Federal Appellate Court, it is one of a large number of cases in which railroad companies have obtained from

various Circuit Courts of the United States, and from State Courts, injunctive relief against the unlawful interference with their business by so-called ticket brokers or scalpers. The Courts have, with practical unanimity, held that a railroad company has a right to issue reduced rate non-transferable tickets; that ticket brokers or scalpers, in inducing the original purchasers of such tickets to transfer the same, and in selling the tickets to other persons in order that they may be used in lieu of passage money or valid tickets, commit a legal wrong against the railroad company, for which no adequate remedy at law exists and that injunction is the proper remedy for such violation of the company's rights. In reaching these conclusions all the contentions urged by defendants in the Court below have been considered and overruled, and the principles of law for which complainant and respondent contends have been approved and supported by ample authority. Scalpers have been enjoined from dealing in non-transferable signature tickets, among others, at the following places: Nashville, Tennessee; Cleveland, Ohio; New Orleans, Louisiana; Washington, D. C.; St. Louis, Missouri; Chicago, Illinois; Indianapolis, Indiana; St. Joseph, Michigan; Jacksonville, Florida; Kansas City, Missouri; Denver, Colorado; Pueblo, Colorado; Dallas, Texas, and San Antonio, Texas. The leading cases on the subject are:

Nashville Railroad Co. vs. McConnell, 82 F. R., 65.
Delaware, Etc. R. Co. vs. Frank, 110 F. R., 689.
Kinner vs. Lake Shore & M. So. R. R., 69 N. E., 614.
Penn. R. R. Co. vs. Beekman, 30 Wash. L. R., 715.
Ill. Cent. R. R. Co. vs. Caffrey, 128 F. R., 770.
Schubach vs. McDonald, 78 S. W., 1020.

Union Pacific R. Co. vs. Philbin, U. S. Circuit Court at Omaha, Judge Munger, June 19, 1906.

D. & R. G. R. Co. vs. Groshell, U. S. Circuit Court at Salt Lake City, Judge Marshall, July 6, 1906 .

Penn R. Co. vs. Bay, 138 Fed. Rep., 203.

Wabash R. R. Co. vs. Wasserman, opinion of Judge Wood, Circuit Court of St. Louis (in pamphlet form.)

In all these cases it was held that facts similar to those presented in the present record make out a clear case of equitable jurisdiction on the grounds of irreparable injury, inadequacy of the remedy at law, and necessity for avoiding a multiplicity of suits. They all declare the correctness and applicability of the following propositions of law, which are so well established that we do not deem it necessary to do more than state them:

1. The contract evidenced by the non-transferable tickets described in complainant's bill is a legal contract between the Railroad Company and the original purchaser of such tickets, and it binds the parties thereto and limits the benefits of the contract to the use of the original purchaser only. No one other than such purchaser can become the beneficiary of the contract, and under its terms the Railroad Company is under no obligation to carry as a passenger any person presenting such ticket unless such person is in fact the original purchaser. See also **Mosher vs. Railroad Co.,** 127 U. S., 390; **Boylan vs. Hot Springs Co.,** 123 U. S., 146; **Drummond vs. Sou. Pac. Co.,** 7 Utah, 118 (25 Pac. 733). The right of a railroad company to issue such tickets is not confined to occasional events, like expositions, conventions, and the like; they may be issued at any time, or continually during a season, as, for instance, the "Winter Tourist

Tickets'' of complainant. The right is recognized in unlimited terms in section 22 of the Interstate Commerce act, 3 U. S., Compiled Statutes (1901) p. 3170.

''There is no limitation that such tickets can be issued only upon special occasions. Neither is there any prohibition against the right to make such tickets non-transferable.'' **Schubach vs. McDonald,** 78 S. W. Rep., 1020.

It follows, therefore, that the sale of such a ticket by the original purchaser is a violation of a legal contract, and the use of one of these tickets by a person other than the original purchaser is a fraud upon the carrier.

2. Such a ticket is not property in the hands of the purchaser in the sense that it can be transferred or sold by him; and trafficking in such tickets is not, and cannot be made, a legitimate business. See also **State vs. Corbett,** 57 Minn., 345 (24 L. R. A., 498); **Jannin vs. State,** 53 L. R. A., 349; **Burdick vs. People,** 149 Ill., 600 (24 L. R. A., 152); **Drummond vs. Sou. Pac. Co.,** 25 Pac. Rep. 733; **Cody vs. Sou. Pac. R. Co.,** 4 Sawyer, 114; **Samuelson vs. State,** 95 S. W. 1012.

Apart from the right of which it is evidence, it is not to be considered property any more than a receipt or voucher for the payment of money, or any other written or printed instrument evidencing a non-transferable contract. The possession of such a ticket by one not entitled to use it simply affords such unlawful possessor an opportunity to defraud the railroad company, or to cause it the annoyance, risk and expense of protecting itself from fraud.

''It is also said that railroad tickets are merchandise,

and may be bought at wholesale at any price for which they can be produced, and may be sold at retail for any price the purchaser will pay. This, again, ignores the plain requirement of the law, that a railroad, as a public agency, must establish and publish its fares and charges, and sell its transportation only at its established rates, and that it is declared a criminal offense to do otherwise. The mercandise theory is an entire perversion of the nature and objects of railroad tickets. A railroad ticket, instead of being merchandise, is, in law, only a receipt or voucher for the payment of the cost of a journey, and evidence of a contract on the part of the rairoad to carry the passenger. It imports that the lawful price of carriage has been paid, and that the holder is entitled to the extent and kind of transportation indicated by the instrument." 4 Interstate Com. Rep., 392.

"If it would be fraudulent, in view of a Court of Equity, for the purchaser to attempt to sell the ticket against his plain knowledge, how can it be otherwise on the part of the ticket broker, skilled in such matters, who, with his eyes open, deliberately purchases or sells a ticket branded on its face illicit?"

Penn. R. Co. vs. Beekman, 30 Wash. (D. C.) L. R., 715.

"It has often been decided by the Courts that the use of one of these tickets in violation of the contract by a person other than the original purchaser, is a fraud upon the common carrier. This is no longer a question."

Nashville R. Co. vs. McConnell, 82 F. R., p. 68.

"The purchaser, when he bought these tickets, knew that he had no right to ride part way on them and sell them for the rest of the way, and the plaintiff (in that case the person who had purchased such tickets from the original purchaser) knew, by the terms of the tickets, he had no right to buy them."

Drummond vs. Sou. Pac. Co., (7 Utah, 118), 25 Pac. Rep., 733.

3. The right of a railroad company to sell its passenger tickets and its right to receive money or valid tickets for transportation of passengers, and its right to make reasonable charges and regulations for the transportation of passengers, are rights of property, and, as such, are entitled to the protection of the law. See also **Lake Shore and M. S. R. Co. vs. Smith,** 173 U. S., 684 **Smythe vs. Ames,** 169 U. S., 466.

It is this property, this right to carry on its business, that the complainant asks the Court to protect in this case.

4. The business of a person or corporation is property which is entitled, under the law, to protection from unlawful interference, and such interference may be prevented by injunction. See also,

National Telegraph News Co. vs. W. T. U., 119 F. R., 294.

Hopkins vs. Oxley Stave Co., 28 C. C. A., 99.

Shoe Co. vs. Sacey, 131 Mo., 212.

Flaccus vs. Smith, 199 Penn. St., 128 (54 L. R. A., 825.)

Springfield Spinning Co. vs. Riley, L. R., 6 Eq. Cases, 551.

Sherry vs. Perkins, 147 Mass., 212.

"The right to carry on a business without interference, without fraud and without obstruction, is one of the most valuable of all rights."

Railroad Company vs. McConnell, 82 F. R., p. 80.

"The case simply calls for an application of the injunctive process to prevent complainant's business from fraud and obstruction, and a business is just as much the subject of suit, with a right to protection, as ordinary

forms of tangible real and personal property. Whatever doubt may have been expressed at any time, the cases are now agreed upon this proposition." Id.

As is also said in Hopkins vs. Oxley Stave Co., 28 C. C. A., 99, at page 106, by Judge Thayer, in speaking of the case of Barr vs. Trades Council:

"It was held, in substance, that a person's business is property, which is entitled under the law to protection from unlawful interference, and that the combination in question was illegal, because it contemplated a wrongful interference with the plaintiff's freedom of action in the management of his own affairs."

And so it was held **(Natl. Tel. News Co. vs. Western Union Tel. Co.**, 56 C. C. A., 198), that the gathering of news and its transmission by telegraph is a business, and as such is entitled to protection against persons undertaking to use such news without permission of plaintiff.

Grosscup, Circuit Judge, in that case, says:

"The business involves, also, the use of property. This consideration brings it at once, in a general way, within the protecting care of Courts of equity.....What is called tangible property has come to be, in most great enterprises, but the embodiment physically of an underlying life—a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment. ..... It is needless to say that to every ingredient of property thus made up, the intangible, as well as the tangible, that which is discernible to mind only, as well as that susceptible to physical touch, equity extends appropriate protection."

In all the cases above cited and in the numerous

cases which might be cited, wherein injunctions were issued to restrain unfair trade or to prevent boycotts, it was this right to carry on one's business which was protected by the Courts.

5. By the scalping of its non-transferable tickets, the railroad company sustains a direct pecuniary injury.

"There is no process of reasoning, however strained, which can, even as a matter of form, conceal this practical fact, that the company is deliberately cheated out of the regular fare of every mile of its line over which travel is made under color of one of these void papers."

Railroad Company vs. McConnell, 82 F. R., p. 68.

In answering the contention made on behalf of defendants in the case of **Baltimore & Ohio R. Co. vs. Beekman, supra**, that the case of the railroad company was one of **injuria sine damno**, the Supreme Court of the District of Columbia, said:

"The reverse of this contention appears so clear to me that but for the earnestness with which it was attempted to be maintained at bar, I would say with the Court in one of the cases cited (I have forgotten which, whether in the Federal Reporter, or in the Ohio case), that I cannot understand how any one could contend otherwise.

"By way of illustrating my view (of course, almost anybody connected with railroad matters could do it better, because more familiar with the matter), I will assume that the average number of ordinary tickets sold from Chicago, for example, to Washington, within a period, would be 50, with a similar number from Washington to Chicago, each at a single rate of $10. The receipts of the two offices from these regular sales would thus be $1,000. If, in consequence of such an extraordinary pub-

lic assemblage as has lately occurred in Washington, the Chicago office should sell 100 round trip non-transferable tickets at $15 each, the receipts from that source at Chicago would be $1,500 additional.

"If each of those round trip tickets should be used as intended by the purchaser, there would be no falling off in the number of straight tickets sold in Washington for Chicago, and the usual $500 revenue from the Washington office would be undiminished. But if fifty of the purchasers of the round trip non-transferable tickets from Chicago should succeed in selling their return coupons here, which would suffice to supply the average demand of ordinary travelers from Washington, then none of the straight tickets at $10 would be sold at the office here, as the average traveler would scarcely pay $10 for a ticket if he could obtain one of the return coupons for the half of that sum, or less.

"In that event the company would certainly receive a wrong, apart from the other wrong which might occur from being obliged to provide cars for those entitled to return on the non-transferable coupons, as well as for the usual average of the transient travelers, who would not be present to occupy the seats the company would have provided for them."

It is comonly argued that the railroad company has received pay from the original purchaser for the return pasage, and it ought to make no difference whom it transports on the return coupon. It is a sufficient answer to say that, as the ticket is non-transferable, the carrier has a right to charge fare to any one other than the original purchaser who attempts to travel on such a ticket, and hence, if by fraud it is induced to refrain from charging fare, it is deprived of a legal right to its damage.

It is not true, however, that it makes no difference to the railroad company what becomes of such tickets after it has once sold them. This has been clearly shown

in the opinion of the Supreme Court of the District of Columbia, from which we have just quoted. It may be stated in another way. Many a person who does not intend to make the return passage on a round trip ticket, or who does not intend to use a ticket for the entire distance for which it is issued, will buy a reduced rate non-transferable ticket, if he knows that after using it as far as he desires to travel, he can then sell the unused portion to a ticket scalper; and thus, by such sale, he obtains his transportation at a lower rate than that which the carrier has a right to charge, and less than it is charging others for similar service. Moreover, the fact that the scalpers traffic in such tickets also induces persons to buy from such people the unused portions and to use them, when otherwise they would buy from the railroad company the regular tickets and pay therefor the regular schedule rate. It follows that the carrier's tolls for its services are, as it were, cut in two both ways and, in each case, by the scalper acting as a clearing house for the fraud. The carrier's business is as effectually injured by the connivance of the ticket scalper as if the latter were selling counterfeit tickets.

If complainant has a right to issue reduced rate round trip excursion tickets, and to restrict their use for passage to the original purchasers, and if it has a right to lift such tickets when presented by others than the original purchasers and to collect the regular fare from those so attempting to use them, it would seem too clear for argument that it suffers a direct pecuniary injury when, by fraud and deception, large numbers of such tickets are used by persons not entitled to ride thereon, and it is thus prevented to that extent from collecting its regular passage money. This obvious result the Interstate Com-

merce Commission had in mind when it referred to the "diminution of revenue" to railroads resulting from the scalpers' operations, the "drain upon them" from such source, and the harmful character of the scalpers' business "in a financial sense."

It would also seem to be equally clear that the extra expense, inconvenience, annoyance, risk, liabilities, etc., to which complainant is necessarily subjected in its efforts to prevent a fraudulent use of special-rate-non-transferable tickets constitute a wrong and damage of an irreparable nature, sufficiently serious and real to afford a complete answer to the defense under discussion.

But, at the risk of supererogation, we offer the following additional illustration or explanation of the damage to a railroad's business resulting from the scalping of reduced-rate-non-transferable tickets, copied from a brief filed in the Supreme Court of Minnesota, in the case of **State vs. Manford**, *infra*:

> "Such a condition is usually inserted in special reduced rate round-trip excursion tickets. The reduced rate being intended to reach a class of passengers who would not otherwise travel, and to enable them to visit some locality on some special occasion, the intention is to make the rate to them only, and to confine the use of such special tickets to such special passengers so far as possible.
>
> "The carriers can at certain times afford to carry a certain number of pasengers to some particular place at a red[illegible]d rate, whereas they could not afford to carry all o[illegible]heir passengers at such rate at such times, or to carry any passengers at such rate at other times. While carrying a number of passengers at full fare they can use a certain proportion of reduced rate passengers to "fill in," and, on the

whole, make a given trip with a given train at a profit. Also when traffic is heavy and their trains are filled, they can haul passengers at a lesser rate than they can when traffic is light and passengers are few. The railroads can afford to carry passengers to the Pacific coast during the Portland Exposition for less than they would be obliged to charge at other times when there are comparatively few people going in that direction. It costs a certain amount to run a train between certain points, and the fare must be sufficient to defray this expense and yield a profit above it. Moreover, the carrier can afford to haul for a less amount the passenger who buys a return ticket, and who, therefore, travels a greater distance over his line, and to insure a return over the same line, return tickets are usually sold for a lesser amount than would be charged for two one-way tickets.

"Every time a ticket broker sells the return part of a special reduced-rate-non-transferable excursion ticket, and every time he sells the return part of a non-transferable return ticket, he commits a fraud either on the purchaser or on the carrier. If he represents to the purchaser that the ticket is good for passage in his hands, he tells him what is not the fact, and procures his money on a false representation; if he explains to him that the ticket is not good in his hands, but that by lying to the carrier and representing himself to be the original purchaser, he may succeed in getting through, he does not wrong the purchaser, it is true, but he and the latter jointly defraud the carrier. By deception they procure transportation for a lesser amount than the purchaser would have been required to pay had he bought his ticket in the regular way. They reduce the income of the transportation company, they take from it by falsehood something of value. And this is fraud.

"It will not do to say that it can make no difference to a carrier whom it carries on the return portion

of a reduced rate ticket. To illustrate this in the case of the excursion ticket, we may take the Pacific coast trip as an example. There are always some people in the Twin Cities whose business may require them to go West to stay for a long period of time or even permanently, and at the same time, there are people in the coast cities who may find it necessary to make a trip to the Twin Cities under similar circumstances. Such people would logically be expected to buy a one-way ticket, and they furnish the railroad companies what may be termed, for convenience, regular traffic. If the business were confined to this regular traffic, the rates would have to be sufficient to pay the expense of operating trains and to yield a profit. Upon an occasion like the Portland Exposition, or during certain seasons of the year when desirable that a low excursion rate be made, and this the carriers can afford to do, provided the regular traffic is not interfered with. They may find it practicable to make a very low rate to such tourists, so gauging it that the amount realized therefrom will help defray the expense of operating trains and will, together with the regular full one-way fares realized from regular traffic, enable them to make a profit; whereas they would find it impracticable to make such rate if all passengers, including the regular traffic, were permitted to travel at this reduced rate. The railroad company says to the tourist: 'I can afford to make you this low rate provided my regular traffic is not interfered with, and I must so condition your ticket that it cannot be used to cut down my regular income. It is upon this condition that I issue the ticket to you and you must abide by that agreement.' If the passenger after having made this agreement goes to Seattle, and there sells the return part of his ticket to a broker, who in turn sells it to one of those who furnish the regular traffic, he is guilty of a breach of contract, and he and the broker and the subsequent purchaser from the broker, who presents the ticket as

his fare to Minneapolis, representing himself to be the original purchaser, deceive the railroad company, and by such deception cause it to lose money. If this can be done in one instance, it can be done and will be done in many, and the regular traffic will be materially interfered with and the regular income so far cut down that the carrier might, in some cases, actually run a train at a loss because of this abuse of special tickets."

It cannot be said that the specific averments in the bill in this case as to the value of the right which it is the object of this suit to protect, namely, to conduct our business free from such harassing and injurious interference as defendants are habitually guilty of, are manifestly fictitious or colorable. We submit, upon the authorities cited in another portion of this brief, that those averments stand until disproved. Complainant was not called upon, under the circumstances, to prove them up with definiteness and certainty. And even were it otherwise, the evidence on the subject, in the absence of any testimony to the contrary, is sufficient to prevent your Honors from finding that the facts appearing on the record create a legal certainty that the controversy does not substantially involve an amount within the jurisdiction of this Court.

6. In addition to the direct pecuniary loss inflicted, the carrier's business is seriously interfered with by the scalping of its non-transferable tickets.

In order to detect and prevent, as far as possible, the fraudulent use of non-transferable tickets, the carrier is subjected to much annoyance, inconvenience, risk and expense. An additional burden is cast upon its conductors and collectors in the effort to distinguish between the rightful owners of such tickets and the pretended or

fraudulent owners. Unavoidable errors are made, which subject the carrier to suits for damages, etc. It is needless to enlarge upon this. The common knowledge of every one will testify to the truth of the statements in this regard contained in Article XII of the bill.

7. One who maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, commits an actionable wrong. If the wrong is recurrent, inflicting irreparable injury, and the remedy at law is inadequate, a court of equity will afford appropriate relief.

In **Angle vs. Chicago, etc. R. Co.**, 151 U. S., 1. 13, it is said:

"It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrong doer."

In other words, when one person wilfully and knowingly interferes and induces and assists one person to violate his contract with another, he commits an actionable wrong. That this doctrine is applicable to the case of a ticket scalper who persuades, induces, assists and enables the purchaser of a railroad ticket to violate the contract contained therein against its transfer, is obvious and has been very clearly shown in the *McConnell case* and the numerous cases which have followed that decision. That the defendants have repeatedly so interfered with and procured the violation of complainant's contracts with the purchasers of its reduced-rate-non-transferable tickets, is admited in the answer; and it is further admitted that they intend to continue to do so in the future.

The remedy at law, suits for damages, is obviously inadequate, because it would involve a multiplicity of suits and because of the difficulty of detecting each offense and the difficulty of ascertaining the pecuniary equivalent for the injury done to complainant's business and for the inconvenience, annoyance, extra expense, risk, etc., involved in the effort to prevent the disregard or violation of its contracts. We have, therefore, an actionable wrong of a recurrent nature, inflicting both pecuniary damage and irreparable injury, the attempt to remedy which at law would involve a multiplicity of suits and afford inadequate relief. The conclusion is irresistible, that complainant has a right to injunctive relief from a court of equity.

In *Flaccus vs. Smith,* 54 L. R. A. 640 (199 Penn St. 128), is a case where the wrongful interference with a man's business by persuading his employes to break their contracts was enjoined, the Court saying:

> "The damages resulting from such an injury are incapable of ascertainment at law, and justice demands that specific relief be furnished in a court of equity. The test of equity jurisdiction is the absence of a plain and adequate remedy at law to the injured party, depending upon the character of the case as disclosed in the pleadings. If equity alone can furnish relief, the injunction must be issued. *Watson vs. Sutherland,* 5 Wall 79."

The case of *Raymond vs. Yarrington et al,* 73 S. W. 800, decided by the Supreme Court of Texas in April, 1903, contains an elaborate discussion of the authorities, English and American, in support of the conclusion that "for persons to knowingly induce one to break his contract

with another gives the latter a cause of action against them for any damages from the breach."

The doctrine seems to have been recognized and enforced by the Supreme Court of Louisiana in *Seeling vs. Dumas*, 48 An. 1494.

After referring to the damage and interference with its business, which results to a railroad company from the scalping of its non-transferable tickets, Judge Thayer said **(I. C. R. R. vs. Caffrey,** 128 F. R., 770, 773):

"The Court is of the opinion that acts of this kind, entailing such consequences, constitute a legal wrong, and that they fall within the reach of a Court of Equity. The defendants are preventing the complainants from exercising a right which the law confers, or at least they are preventing the complainants from transacting their business in a perfectly lawful way unless they take the chances of sustaining a great loss, which seems to be almost certain to ensue. If an individual prevents another from having that free access from his premises to a public thoroughfare to which he is by law entitled, by placing any obstruction in front of his premises, a wrong is committed on account of which the law will afford redress. There is little perceivable difference between an injury of that character and the wrong complained of in the bills, whereby the complaining companies are practically prevented from transacting their business in a way they are entitled to transact it. The Court concludes, therefore, that the allegations of the bill, all of which are confessed by the demurrer, disclose a legal wrong within the preventive jurisdiction of a Court of Equity, and several other Courts have reached the same conclusion."

In further support of the proposition that Equity has jurisdiction to enjoin the defendant ticket scalpers

from present or future interference in contracts between complainant and the purchasers of its tickets, and in further illustration of the doctrine announced in **Angle vs. Chicago etc. R. Co.**, (*supra*), we call attention to the following authorities:

Exchange Telegraph Co. vs. Central News Co. 2 Ch. 48—76 L. T. (N. S.) 591.

Ex. Tel. Co. vs. Howard Agency, L. T. Vol. 120, March 31, 1906.

Am. Law Book Co. vs. Ed. Thompson Co. 84 N. Y. S. 225.

Fleckenstein Bros. Co. vs. Fleckenstein, (N. J. Ch.) 57 Atl. R. 1025.

Sperry & Hutchinson Co. vs. Mechanics Clothing Co. 128 Fed. Rep., 800—1015.

Sperry & Hutchinson Co. vs. Brady, 134 Fed. Rep., 691.

Sperry & Hutchinson Co. vs. Temple, 137 Fed. Rep., 992.

Natl. Tel. Co. vs. Western Union Co. 119 Fed. Rep., 294.

Garst vs. Charles, 187 Mass. 144.

Board of Trade vs. Christie Co. 198 U. S. 236.

Board of Trade vs. Cella Co. 145 Fed. Rep. 28.

Board of Trade vs. McDearmott, 143 Fed Rep. 188.

Knudson vs. Benn, 123 Fed. Rep. 636.

Martin vs. McFall, 65 N. J. Equity, 91.

Wells & Richardson Co. vs. Abraham, 146 Fed. Rep. 190.

In **Board of Trade vs. Christie Company,** 198 U. S., 236, Mr. Justice Holmes, in his opinion declaring the right of the complainant to an injunction, said:

"The plaintiff does not lose its right by communicat-

ing the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach."

In **Sperry & Hutchinson Company vs. Mechanics Clothing Co.**, 128 Fed. Rep., 800, the Court said:

"It is the contention of the complainant that the trading stamp remains its property even after it has gone into the hands of a customer and has been received by him as a discount for a cash purchase. Upon the proofs, I find that the title to the stamps, while they are in the hands of the merchant is a limited one and that he acquires no right to dispose of them otherwise than according to the contract. It follows that merchants who should sell the stamps or dispose of them not in the way prescribed, would violate the contract with the company.

"The complainant has introduced evidence that the defendants had in their possession stamps which could only have been acquired by the defendants from merchants who had disposed of them in a manner not authorized by the contract. There is also evidence tending to show that defendants have solicited merchants, under the contract with the complainant, to purchase trading stamps, and have sold trading stamps to such merchants. The evidence is sufficient to show that the defendants have full knowledge of the character of the contract between the merchant and the company, and that they have deliberately sought to induce merchants to break these contracts, to the detriment of the complainant. That the complainant is entitled to an injunction to restrain the defendants from such unlawful interference with its contracts seems to be well established."

In **Wells & Richardson Company vs. Abraham**, 146

Fed Rep., 190, the complainant, manufacturers of a medicinal product, sold such product only to wholesale or jobbing druggists who agreed that they would only sell at stated prices and discounts to such dealers as had executed contracts with complainant agreeing not to sell for consumption except at the prices fixed by the complainant, and that they would not sell at all to dealers who had not similar contracts with the complainant. The defendants, not having such contracts, induced or co-operated with some vendees of the complainant bound by such contract, to sell defendants the product, and then the defendants sold such products after having removed the labels from the bottles. The complainant filed a bill to enjoin the defendants from dealing in such products, and the Court in granting that injunction said:

"But the defendants contend that the defendants cannot be enjoined from purchasing the goods, or selling them after purchase. That proposition in connection with the facts appearing amounts to this: That the complainant's vendees are legally bounden by contract not to sell to the defendants, but that the defendants may, so long as they use neither force nor fraud, intentionally co-operate with them to do an illegal act—that is, break the contract—and be immune. The briefs abound in decisions, but no precedent should be required. A. is intentionally doing B. a legal injury. C. intentionally induces A. to do the injury. He solicits that it be done. He pays money to the doer of it to tempt him to do the act; that is, A. and C. unite, connive, agree and procure A. to break his contract, so that C. may get complainant's goods, which the latter has committed to A. upon the trust that they shall not be delivered to C., and others similarly situated. In such an instance the law should have sufficient inherent integrity to enable it to lay fast hold of A. and C. and stop both such deliberate breach of obligations

and the advantages that the persons implicated in it are gaining. The law permits the complainant to use the direct contract system to maintain the price of its medicine, so that it shall not be the subject of capricious sales at varying prices. The complainant is under no obligation to sell to the defendants. The defendants have no right, equitable or legal, to insist upon sales to them. The complainant sells to others only upon their solemn stipulation that they will not sell to persons situated as are the defendants. The defendants induce them to break such contract, and take part with them in breaking it, and get the goods, not by rightful purchase, because their vendors have no right to transfer the title to defendants, but by procuring these vendors to deliver to the defendants the goods, knowing that they have agreed with the complainant, upon its parting with title to its vendees, that the latter would not give title to these defendants. Remember that it is conceded that the contract is good and legal between the parties. If so, the defendants have attempted to take title from a person who has no right to transfer the legal title to any person of the class to which the defendants belong. Hence the defendants get goods by procuring the avoidance of another's obligation that he will not give it to them. Whatever may be said argumentatively, no sane conscience can justify one man inducing another to betray a legal obligation. The point of wrong should not be missed. It is not primarily in selling a product which the makers have limited to be sold by others, of which the defendant is not one. The very vital wrong is that the defendants have obtained and are obtaining the goods by inducing others, not entitled to sell to them, to make sale to them, whereby the defendants come into possession by doing the complainant a legal injury, a wrong, that makes such possession wrongful. A contract prohibiting alienation to a particular class is held to be lawful. It is admitted to be lawful. How then, can the restriction upon alienation become unlawful in a court of equity, and how can a third person be heard

to declare it unlawful, when an attempt is made to enjoin one from inducing a party to it to violate it? Is it valid at law and void in equity? If it is valid, it is property, and a court should be authorized to protect it, as any other property may be protected that is menaced by a wrongdoer. The law of the land accords with good morals. In **Heath vs. American Book Co.** (C. C.) 97 Fed. 533, the defendant knowingly induced the school book board of counties to purchase books from him, and discard those of the plaintiff, which they by contract were obligated to take. The defendant was held liable for damages. No fraud or misrepresentation was alleged. The learned judge followed **Lumley vs. Gye,** 2 El. & Bl. 216, in which a singer was maliciously induced by defendant to break her contract with another, and the defendant was held liable for damages. In **Angle vs. Chicago,** etc., R. 151, U. S., 1, 14 Sup. Ct. 240, 38 L. Ed. 55, the plaintiff was prevented from completing a contract by the defendant bribing its officers and inducing by false allegations the Legislature to withdraw a grant of land, and a bill in equity to reach the property held by the defendant and adjudged applicable to the payment of plaintiff's damages was sustained. The opinion states that "it has been repeatedly held that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer," and in support of this instances **Green vs. Button,** 2 Cr. Mees. & R. 707; **Lumley vs. Gye,** 2 El. & Bl. 216; **Bowen vs. Hall,** 6 Q. B. D. 333, 337; **Walker vs. Cronin,** 107 Mass. 555; **Jones vs. Stanly,** 76 N. C. 355, 356; **Haskins vs. Royster,** 70 N. C., 16 Am. Rep. 780, and thereupon the opinion proceeds:

"Under these authorities, if the Omaha company had by its wrongful conduct simply induced the portage company to break its contract with Angle, it would have been liable to him for the damage sustained thereby. A fortiori, when it not only induces a breach of the contract

by the portage company, but also disables it from performance.' ''

The Court then proceeds to refer to and quote from numerous cases in point, and to discuss and differentiate the authorities relied on by defendant in the case before it.

It is to be noted that in all the injunctions issued by the Courts in the above cases, the defendants were restrained from interference not only with the existing contracts between the complainants and their customers, but the injunctions issued, from their meaning and effect, also covered future contracts. In all these cases the Courts recognized the fact that they had the power and it was their duty to settle by one decision the entire controversy between the parties, so as to avoid a multiplicity of suits and not impose upon the complainants the great burden of asking for a new injunction upon the occasion of each additional sale of goods, and the issuance of a new contract accompanying such sale.

8. The railroad company is manifestly without any adequate remedy at law for the violation of its ticket contracts and the interference with its business complained of, so that for the damages and injury sustained, if there is no remedy in equity, there is none whatever in any just sense. To bring a separate suit for damages in the case of each ticket sold would involve a multitude of suits, excessively burdensome and expensive, and not likely to afford any substantial result to the carrier. It is a case of frequently recurring wrong calling for injunctive relief.

9. A bill filed by a railway company making as party defendants all the ''scalpers'' engaged in the scalping business at a particular place, is not multifarious.

In addition to the ticket scalper cases referred to above, see **Smith vs. Bevins,** 56 F. R. 352; **Barcus vs. Gates,** 89, F. R. 783; **Hale vs. Allison,** 188, U. S., 72; **Wyman vs. Bowman et al,** 127 F. R. 257.

The refusal of the Circuit Court to hold that the bill was multifarious was not assigned as error on the cross-appeal. The defense of multifariousness is not properly before this Court. This question, however, as well as other questions relating to the jurisdiction of a court of equity over cases like the one at bar, is so fully and ably covered by the opinion in **Pennsylvania Company vs. Bay,** Fed. Rep., decided in September, 1906, that we feel justified in quoting extensively therefrom as follows:

"Complainant files its bills to restrain defendants from dealing now or hereafter in those railroad tickets and other documentary evidences issued and to be issued by the railroad company and made exchangeable for passage upon its trains, which purport, upon their face, to be non-transferable.

"From the bill it appears that there are in this country four associations known, respectively, as the "American," "National," the "American Travelers" and the "Guarantee" Ticket Brokers Associations, the members of which, known as ticket brokers or scalpers, have offices in all the principal cities of the United States; that defendants are all members of one or the other of said associations; that they act in concert and stand by each other; that all tickets sold by any one belonging to the association are guaranteed by the association; that complainant has issued and intends in the future to issue, from time to time, as occasion requires, special tickets to persons desiring to attend conventions upon its own lines and also upon connecting lines, and for other particular occasions, involving the accomodation of large numbers of people, for which a charge is, in different ways, made

at a lower price than its regular rates; that such practice is essential to the carrying on of its business as a common carrier; that all of these tickets or certificates are made non-transferable, and their use is limited to the persons to whom they are issued; that defendants are engaged in defeating the precautions taken by complainant to limit the use thereof to the party to whom they were issued and to that end in various ways procure the false impersonation of the original party by others, and thereby secure to such impersonator transportation upon the unused portion of such ticket or certificate at rates much less than the regular rate, that in this way defendants defraud complainant and harass the traveling public; that whenever discovered the tickets or certificates or whatever is used are taken up and the holder required to pay full fare or leave the train. The bill then recites the present and intended future issuance of a great number of such tickets to those desiring to attend the St. Louis Fair commemorating the Louisiana purchase, giving a stop over privilege at Chicago; that the practice of defendants is contrary to the laws of Illinois and of the United States; that unless restrained, defendants and each of them will, in the ordinary course of their business, engage in the said unlawful traffic in the St. Louis Fair tickets or certificates, all of which are by their terms non-transferable; that it is not possible to detect the fraud in all cases; that owing to the non-residence of many of the parties using such tickets or certificates, it is impracticable to prosecute them, and the number of cases is so great that it would be impossible to obtain any adequate redress by means of suits at law. It further alleges that attempts to detect the said frauds will cause constant, continuous, and irremediable annoyance and injury to complainant, for which it has no adequate remedy at law; that all ticket brokers are practically in combination or conspiracy to defraud railroad companies; that said defendants "have been joined herein because their business and transactions complained of are in act, purpose, and effect identified,

and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them." The bill further avers that defendants "are engaged in the business of selling and purpose to continue in the business of selling and regularly dealing in said non-transferable tickets issued for transportation over your orator's railroad."

"The defendants, after certain preliminary proceedings, filed an answer, and the cause was referred to a master to take proofs and report his findings of fact and law. In the meantime, defendants consented to the entry of a preliminary injunction limited to non-transferable tickets or certificates given on account of the St. Louis Fair. The cause is now before the Court on exceptions to the master's report. A multitude of exceptions were taken to questions and answers which merely tend to advise the court of the general character of the defendant's business methods. They are not such as work any damage or wrong to them, when the cause is before the court without a jury, and they will therefore be overruled. For defendants it is contended that no case is made aginst them which justifies their joinder herein. As before stated, they were made parties, it is claimed, because their methods are alike with regard to complainant's business, and to avoid a multiplicity of suits. The joinder does not rest upon conspiracy or combination to injure complainant, though the bill charges that their acts practically amount to that. As stated above, it is alleged in the bill and abundantly established by the evidence and the report of the master, that defendants stand in the attitude of waiting until special non-transferable tickets or certificates are issued by complainant upon which they may seize, contrary to law, and traffic in them to their own advantage and to the injury of complainant. It does not appear directly that they have all done so; but that the business is such that in pursuing it they must needs have done so and continue so to do.

"It seems to be pretty well established by the author-

ities that the thing sought to be protected in such suits is the right of the railroad company to issue non-transferable tickets and reserve to itself the advantage, whatever it may be, of having them maintained as non-transferable in fact. It is easy to understand how there may result very material benefit to the railroad from such a limitation, as well as very great injury from the anticipated action of defendants with reference thereto. It is not a fair or reasonable construction to hold that this suit is brought merely to protect the various limited contracts for transportation which may be issued by the railroad company from time to time. It appears from the evidence that the accomodation of the traveling public makes it a matter of necessity that special occasion tickets be issued. It is justified by long usage and popular demand. It is an indispensable incident to the exercise of their charter privileges. It is a present right to a future benefit. This proposition finds legal sanction in numerous cases. In **Scott vs. Donald,** 165, U. S. 107, it was held that the court had jurisdiction to restrain seizures under the South Carolina dispensary law threatened against future importations of liquors upon the ground that the thing to be protected was the right to import, as part of complainant's business.

"Judge Thayer ruled in the case of **Illinois Central Railroad vs. Caffery et al,** 128 Fed Rep. 770, that the action of ticket brokers in regard to these special tickets is an interference with the rights of the railroad companies, and that a court of equity has a right to intervene. The same position was taken by Judge Dixon in **Atchison, Topeka & Santa Fe R. R. Co. vs. Kirby et al,** unreported, as far as I am advised. To the same effect is the opinion of the court in **Schuback vs. McDonald,** 78 S. W. Rep. (No.) 1020. 'The right asserted by the railroads and denied and threatened by the ticket brokers" says the Court, "is a right that is natural to mankind. It is a right that the legislature of this state and the Congress

of the United States have expressly conferred upon the corporation railroads, and which the Supreme Court of the United States has expressly declared they possess. It is a right that is guaranteed to every man by the organic law of the land, a right to contract concerning a legal subject matter, such right is property within the meaning of the law. The ticket brokers deny the existence of that right and threaten to invade it. The law affords no adequate remedy for such an infringement of such a right.'

"In **National Telegraphic News Company vs. Western Union Telegraph Company,** 119 Fed. Rep. 299, it was said by Judge Grosscup, speaking for the Court of Appeals for this Circuit:

> 'What is called tangible property has come to be, in most great enterprises, but the embodiment physically, of an underlying life—a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment.
>
> 'It is needless to say, that to every ingredient of property thus made up—the intangible as well as the tangible, that which is discernible to mind only, as well as that susceptible to physical touch—equity extends appropriate protection.'

"The cases of **Louisville & Nashville R. R. Company vs. Bitterman,** decided March 27, 1906, by the Court of Appeals for the 8th Circuit; **B. & O. R. R. Co. vs. Sayre, et al,** (Superior Court of Cincinnati) and numerous other decisions of the courts are to the same effect. The right to all manner of legitimate railroad business, including as a vital part thereof, the right to issue non-transferable tickets as it may elect from time to time and have them maintained as such is undoubtedly inviolable in complainant. It is its pasture land and defendants have been

grazing in it and threaten to do so again and as often as the same presents good grazing. The facts would come within the decision in **Smith vs. Bivens,** 56 Fed. 352.

"While the stipulation upon which the preliminary order was entered reserves to defendants the right "to object to the power and jurisdiction of the court in the premises to grant any or all of the relief prayed for in and by said bill," yet it fairly waives the question of multifariousness, otherwise no order could have been entered.

"It goes without saying that complainant would be compelled to bring innumerable suits at law in order to protect its rights, if there were no jurisdiction in equity to grant the relief here sought. The utter withdrawal of all special rate tickets would seem to be the only solution of the situation. There would practically exist a wrong without a remedy.

"If then complainant has a present property interest in the right to issue these tickets from time to time, (and the reasoning of the cases before cited is clearly to that effect) it follows that the relief here sought is not merely the protection of these special tickets, but of the right to issue them. The railroad business of the complainant, including all the various avenues through which it lawfully expresses itself and operates, is a unit. This unit, with its right to transact business here sought to be protected, is a substantial property interest, and is now before the court as a court of equity, asking for that relief which equity is so well equipped to decree and enforce.

"In **Hale vs. Allinson,** 188 U. S. 77, it is said that where there is a community of interest among a number of defendants in the questions of law and fact involved in the general controversy, jurisdiction exists to maintain suit against a number of persons to prevent a multiplicity of suits. To the same effect are **Wyman vs. Bowman,** 127 Fed. Rep. 263, and the cases therein cited. And in **Hayden vs. Thompson,** 71 Fed. Rep. p. 60 and **Salvage vs. Hyde,** 5 Mass. 146, it is declared that no bill is multifarious which presents a common point of litigation, the de-

cision of which will affect the whole subject matter and settle the rights of all the parties. To the same effect is **Nashville C. & St. L. Ry. vs. McConnell,** 32 Fed. Rep. 65.

"It is well settled that the question of multifariousness is largely within the sound discretion of the court, and that each case must depend upon its own circumstances. Counsel for defendant himself says on p. 147 of his brief that the only question involved in the case is the issuance of an injunction forever restraining the defendants from dealing in any tickets of the complainants, thus appealing for a decision upon the power of the court to enjoin defendants from dealing in non-transferable tickets and not depending upon the point under consideration. Whether this be so or not, I am of the opinion that the bill is not multifarious. This objection is usualy reached on demurrer, but in the present case it is urged in exceptions to the report as appearing from the evidence, as well as saved in the answer. The exception is overruled."

The text books all declare that remedies at law against scalpers are inadequate and injunctions afford the proper relief. 2 Pomeroy's Equitable Remedies p. 634; 1 High on Injunctions (4 Ed.) p. 621 e.

III. **THE NEW YORK CASES OF PEOPLE EX REL TYROLER VS. WARDEN,** 157 N. Y. 116, and of **N. Y. C. & H. R. CO. VS. REEVES,** 85 N. Y. SUP. 28.

So much reliance is apparently placed by petitioners upon two New York cases that we have deemed it worth while to discuss them under a separate heading.

The question involved in the Tyroler case differs radically from that presented in the instant case. The matter before the Court of Appeals of New York was the constitutionality of a statute absolutely prohibiting the ticket

brokerage business without a license from some transportation company, which declared illegal the buying and selling of all railroad tickets, whether transferable by their terms or not, including in its condemnation such reputable concerns as Cook's Agency and the like. This is a very different proposition from the denial of the right of a ticket broker to buy a ticket in violation of the contract therein embodied and to sell the same to a third person for the purpose of being used to secure transportation which both the purchaser and broker must know the ticket is not good for.

Judge Parker's opinion proceeds upon the idea that as to some kinds of tickets there can be nothing fraudulent or immoral in transferring or selling the same, whereas in other kinds of tickets fraud would necessarily be involved. He conceded that legislation could be sustained under the police power prohibiting the traffic in tickets which are void except in the hands of the original purchaser and the sale of which would be fraudulent; but he denied the right of the State, under the guise of the police power, to prohibit the transfer or sale of transferable tickets sold at the standard schedule rate. In the course of his opinion he said:

"If the act prohibited is fraudulent, there can be no doubt that the Legislature, under its police power, may provide for its punishment; but whether it may, under such power, interdict the sale of a valid ticket by one person to another upon the pretext that fraud will thus be prevented, presents a very different question. I confess I am unable to see how such a sale defrauds a transportation company."

As the kind of tickets which defendants were enjoined in the court below from dealing in belong to the

class which Judge Parker seems to concede it would be fraudulent or immoral to traffic in and the sale of which he seems to concede could be interdicted by statute, the New York case cannot be considered as affording any real support to the argument of the other side.

Moreover, the decision of the New York Court of Appeals stands absolutely alone. Its reasoning, its views of the ticket brokerage business, and its conclusions, so far as they are relied upon by the defendant ticket brokers now before this court, have not only not been followed by any other court but they have been rejected and disapproved by the Supreme Courts of numerous States in deciding similar cases. For instance,

In *Allardt vs. People*, 197 Ill. 508 (1902), the court, referring to a previous decision upholding the validity of a law against ticket scalping, *Burdick vs. People*, 149 Ill. 600, said:

> "The correctness of the decision reported in 149 Ill., *supra*, has never been questioned in this Court. It is in harmony with the decisions of courts of last resort upon similar statutes, rendered both before and since its adoption. (Citing *Frye vs. State*, 63 Ind. 553; *State vs. Corbett*, 57 Minn. 345; *Jannin vs. State*, 51 S. W. 1126.) The validity of like statutes in the State of North Carolina was reviewed in *State vs. Clark*, 109 N. C. 739, and *State vs. Ray, Id.*, 736. But a single authoritative case has been found to the contrary (*People vs. Warden*, 157 N. Y. 116), in which Parker (C. J.) rendered an opinion of the majority of the Court of Appeals of that State, holding the law unconstitutional, and to which three of the Judges disagreed. Elaborate dissenting opinions being filed by Justices Bartlett and Martin."

The case of *Jannin vs. State,* 51 S. W. (Texas) 1126, was a prosecution for selling a railroad ticket contrary to an anti-scalping law. The Court said:

> "**These questions** have all been so thoroughly discussed under similar laws of other States, that it would appear to be a work of supererogation to reiterate what other courts have said on this subject, and, in the face of a number of able decisions of other States, we would not undertake to add anything new to the discussion of the questions here involved. See *Com. vs. Wilson,* 14 Phila. 284; *Fry vs. State,* 63 Ind. 560; *Burdick vs. People,* 149 Ill. 600; 36 N. E. 948; *State vs. Corbett,* 57 Minn. 345, 59 N. W. 317; *State vs. Bernheim* (Mont.), 49 Pac. 441; *People ex rel. Tyroler vs. Warden of City Prison,* 26 App. Div. 228, 50 N. Y. Supp. 56, and reported in the Court of Appeals of New York, 51 N. E. 1006. By reference to the above cases, it will be seen that this constitutional question with reference to scalpers' tickets, in one shape or another, has been before the courts of several States mentioned, and the holding was in favor of the constitutionality of the law in all of said States except New York."

The case of *In the Matter of Hugh J. O'Neil,* decided by the Supreme Court of Washington, December 27, 1905, 83 Pac. Rep. 104, is another of many cases in which the New York case is referred to with dissent. It is said:

> "Undoubtedly the weight of decision in reference to this particular class of statutes is against the holding of the New York court, and apparently that court stands alone."

See also *Commonwealth vs. Keary,* 198 Pa. State 500.

In the case of **State vs. Thompson** (February, 1906), 84 Pac. Rep. 476, the Supreme Court of Oregon followed the Supreme Court of Washington in upholding the validity of an anti-ticket-scalping statute. The concluding paragraph of the opinion read as follows:

"We deem it unnecessary to discuss further the questions argued upon this appeal, for the reason that legislation similar to the act in question has been adopted in many of our sister States, and its constitutionality has been sustained by all of their highest courts, with the single exception of the State of New York, where two dissenting opinions were rendered that agree with the following decisions, which fully discuss all questions raised in the case at bar, and all of which hold it within the police power of a State, through its legislature, to enact such a law as the one in question.

"*Fry vs. State,* 63 Ind. 552; *Burdick vs. The People,* 149 Ill. 600; 36 N. E. 948; *State vs. Corbett,* **57** Minn. 345; 59 N. W. 317; *Commonwealth vs. Keary,* 198 Pa. St. 500; 48 Atl. 472; *Jannin vs. State,* 42 Texas Cr. Rep. 631; 51 S. W. 1126; 96 Am. St. Rep. 821; *State vs. Bernheim,* 19 Mont. 512; 49 Pac. 441; *Ex parte O'Neil,* Supreme Court, Washington, Dec. 27, 1905; *State vs. Manford,* Minnesota, Oct. Term, 1905.

"The only courts holding adversely to the above decisions are the courts of New York, which follow the opinion of Chief Justice Parker of the New York Court of Appeals, in the case of *People ex rel. Tyroler vs. Warden of Prison,* 157 N. Y. 116, in which case the decision is largely based upon two grounds; first, that the New York statute conferred authority upon an agent of one railroad to sell the tickets of any other railroad, which the statute in this State does not do,

it expressly limiting his authority to the sale of the tickets of the road appointing him; and, second, on the ground that the act was a violation of the liberty of the citizens guaranteed him by the Constitution to engage in ticket brokerage, which the State could not take away by the exercise of its police power. We are, however, unable to agree with the logic or the reasoning of that opinion, but prefer to accept the reasoning and the logic of the two dissenting opinions written in the same case, which have been practically adopted by the cases above mentioned."

One of the latest cases joining the universal chorus of dissent from the views of Judge Parker on the subject of ticket scalping is that of **Samuelson vs. State**, decided in September, 1906, by the Supreme Court of Tennessee and reported in 95 Southwest Rep. 1012, 1017.

"Again it is contended that the effect of this statute is to deprive a party of a property right without due process of law. The courts generally, if not entirely, agree in holding, as to the character of a passage ticket, with the dissenting judges, Bartlett and Martin, in **Tyroler's Case**, 157 N. Y. 116, 51 N. E. 1006, 68 Am. St. Rep. 763, that it is not property, nor is it to be treated as property in its general sense, but as a simple token of the purchaser's right to be transported on the railroad between the points named on the ticket, and when it has served its purpose to be delivered to the carrier issuing it. This was the view taken in **O'Rourke's Case**, 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639. So it is the courts have held that the sale of such tickets by persons other than the carrier or his agents, as a business, is not an employment in which they have an unqualified right to engage. If it be true that the ticket is a mere incident to the business of the carrier in transporting his passengers, possessing none of the ordinary

elements of property, then it follows that, without the consent of the carrier, dealing in these tickets cannot form the basis of a legitimate independent businss. As is said by Mr. Freeman in the note referred to: 'Third persons have no constitutional right to interfere with the relations between the carrier and the passenger by the purchase and sale, without its consent, of tickets issued by the former. Hence statutes which confine the purchase or sale of such tickets to the carrier, or his authorized agent, can in no way deprive a third person of his property without due process of law, nor deny to him the equal protection of the law.' The same authorities which are cited by Mr. Freeman in his discussion of the question of the exercise of police power and class legislation involved in such acts are cited by him to the proposition above, with the addition of *Ex parte Lorenzen*, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55, 79 Am. St. Rep. 47. The State of New York stands alone in maintaining a contrary rule."

It is true that certain anti-scalping legislation was declared unconstitutional by the Supreme Court of Illinois in the **Allardt Case** and by the Court of Appeals of Texas in the **Jannin Case**. The Illinois statute was found to have a fatally defective title, and also to be repugnant to Section 22 of Article 4 of the State Constitution forbidding the granting of special privileges to corporations and associations. In the Texas case it was held that the statute as framed was violative of section 28 of the bill of rights in the Texas Constitution, and was also open to the objection that it did not precisely define the penal offense with which it dealt. The Supreme Courts of numerous states, whose decisions we have been citing above, reached entirely different conclusions when similar objections were urged against similar legislation.

But, in our opinion, decisions against the validity of a statute prohibiting the scalping of certain classes of tickets are of little importance in this case. We are not dealing with an act of the legislature which must stand or fall as written, which the Court is powerless to amend if found to be too broad or indefinite, and which is stricken with nullity if in conflict with any provision of the organic law. The form of the injunction to be issued in this case is entirely within the control of the Court. We do not believe that the objections urged against the extent of the injunctive relief allowed by the Court of Appeals have any merit, but should this Court hold otherwise it may, and doubtless will, indicate the form and extent of the writ to which we are entitled. We shall refer again to this point later on.

That the case of **Tyroller vs. Warden** would not be regarded even by the New York Courts as a precedent for denying injunctive relief in the case before this Court will appear from the following quotation from **Collister vs. Hayman** (183 N. Y.), 76 N. E. Rep. 20, 22, a case in which the court held that a theater ticket was mere evidence of the right of the holder to admission to the theater at the date named, and that restrictive conditions upon the sale thereof were valid or enforceable:

"Restraint by statute and restraint by contract are quite different. What the parties to a contract agree upon is valid almost without limitation, but what the Legislature may prohibit parties from agreeing upon is subject to the limitations of the fundamental law. Those limitations do not bear upon the case now before us. Our recent decision in **People ex rel Tyroller vs. Warden,** etc.,157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763, relied upon by the appellant, is not analogous. We there adjudged unconstitutional a statute

which prohibited as a crime the selling of transportation tickets by any person except common carriers and their specially authorized agents, in so far as it undertook to prohibit citizens of the state from engaging in the business of brokerage in passenger tickets. This case involves, not a statute, but a contract, which excludes no one from carrying on the business of selling theater tickets, but simply prevents a sale thereof on the sidewalk in violation of the express stipulation of the tickets themselves."

The only civil case that we are aware of where views have been expressed contrary to those urged on behalf of complainant, is also a New York case, *New York Central & H. R. R. Co. vs. Reeves,* 85 N. Y. Supp. 28. A single judge of the Supreme Court denied a motion for a temporary injunction. In doing so, he gave a "memorandum" of his views, although at the time the question was, as he says, "purely academic." The opinion is flippant in tone, contains no reference to the numerous cases diametrically opposed to it, and has been followed in no subsequent case. Like the *Tyroler case,* which is doubtless responsible for it, the *Reeves case* stands alone. The Court gravely says that it cannot see how the railroad company will be damaged by the sale of a piece of paper; that it cannot assume that it would be sold again as a valid ticket contract; and that it cannot believe that any third person would be so dishonest as to attempt to secure transportation by it, in the face of the non-transferable conditions contained therein. The best excuse that can be offered for such a decision is the imperfection in the showing made for the preliminary injunction. For instance, on page 34, it is said:

> "It is not alleged that any of the defendants have threatened to buy or sell these tickets hereafter to be

issued; there is nothing from which the Court may reach the conclusion that any one is going to purchase these tickets, or that if they do purchase them, they will sell them to any of the defendants; or that if they do sell them, that any of the defendants will be able to sell them; and the whole case rests upon mere assumption based upon assumption, while all the presumptions of law are in favor of innocence, honesty, and a discharge of the duties of citizenship."

IV. THE CIRCUIT COURT OF APPEALS WAS RIGHT IN HOLDING THAT THE CIRCUIT COURT ERRED IN LIMITING THE INJUNCTIVE RELIEF TO NON-TRANSFERABLE TICKETS ISSUED ON TWO OCCASIONS PRIOR TO THE FINAL DECREE. COMPLAINANT IS ENTITLED TO HAVE ITS BUSINESS OF ISSUING REDUCED RATE NON-TRANSFERABLE TICKETS PROTECTED FROM CONTINUING AND RECURRING TRESPASSES BY THE DEFENDANTS, AND THE PROPER METHOD FOR A COURT TO AFFORD SUCH RELIEF IS BY ENJOINING DEFENDANTS GENERALLY FROM "SCALPING" THE NON-TRANSFERABLE TICKETS OF COMPLAINANT WHENEVER ISSUED.

It was to correct that error that complainant appealed the case. It is the crux of the controversy, so far as complainant is concerned. If it has to bring a separate suit to protect its rights every time it or its connections propose to issue any special rate non-transferable tickets, it will be forever involved in a multiplicity of suits. We, therefore, earnestly ask your Honors' consideration of the reasons which we are about to urge in support of the contention that complainant is entitled to relief co-extensive with the right to be protected and the wrong and injury threatened.

The bill states that at all times it is complainant's custom and usage, and that of its connecting lines, to

issue tickets at reduced rates on various occasions to the traveling public, which, by the terms thereof, are not transferable, etc., that defendants, and each of them, are, and have been for some time, engaged in the business of buying and selling, and dealing in such tickets, and in soliciting and inducing the original purchasers to sell the same, etc., that unless complainant has the injuctive relief herein prayed for, it cannot continue to make reduced rates as heretofore on the occasions of conventions, Mardi Gras festivals, and other like occasions, frequently occurring, etc. See Articles XIV, XV and XVI. The prayer is for an injunction restraining and prohibiting defendants from buying, selling, etc., any ticket or tickets, or the return coupons, or unused portions thereof, issued by complainant, or by its connections for use over its lines, which, by the terms thereof, are non-transferable.

In their answer (paragraph IX) respondents admit that they are each engaged in the business of buying and selling the unused portions of railroad tickets, whether the same are stamped "non-transferable" or not. They further admit (paragraphs XIII and XIV) that it is the custom and usage of complainant and its connections to issue railroad tickets at reduced rates to the traveling public on various occasions, such as expositions, conventions, Mardi Gras, reunions, or other public gatherings, and that the tickets which are usually issued by complainant purport by their terms to be non-transferable and to constitute a so-called special contract between complainant, the lines issuing the same, all other lines over which the same entitle the holders to travel, and the original purchasers of the tickets, whereby the original purchasers are forced to agree that said tickets shall not be transferred by them to any other persons; and

they further admit that they are, and have been for some time, in the business of buying and selling, and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and transfer the same to defendants, with the intent and purpose that such tickets shall be used by the second purchasers thereof. They deny any fraud, deny that complainant has any right to make its tickets non-transferable, and assert that complainant has acquiesced in the scalping of its tickets.

In granting the preliminary injunctions, Judge Boarman, and later Judge Parlange, declared and applied all the principles of law needed to support an injunction against defendants' trafficking in any non-transferable tickets issued by complainant. They found that complainant had a right to issue such tickets; that defendants, in doing what they admit in their answer they have done, and propose to do, in respect of said tickets, commit a legal wrong against complainant, for which no adequate remedy at law exists and the proper remedy for which is the preventive remedy afforded by an injunction. A preliminary injunction was accordingly issued to prevent the scalping of the proposed U. C. V. tickets. Afterwards Mardi Gras tickets of 1904 were similarly protected. The Court was prepared, as a matter of course, to enjoin the scalping of any non-transferable tickets issued on any occasion during the pendency of the suit. But when the final decree was rendered, Judge Parlange came to a most illogical halt and declared that, while complainant was entitled to the relief prayed for, so far as concerns the tickets covered by the two interlocutory injunctions, it was not entitled to relief as to future issues of similar tickets. He accordingly confined the final injunction to tickets issued on the occasions of the Confederates' Re-

union and the Mardi Gras of 1904, past and dead issues, and denied relief as to non-transferable tickets thereafter to be issued, "without prejudice, however, to the right of complainant to seek such relief by independent proceedings on or before each occasion when it may issue such non-transferable tickets."

In other words, while the trial Judge was convinced that the scalping of any non-transferable tickets was a wrongful act which should be enjoined, yet he considered it necessary that every issue of such tickets must be the subject of a separate suit; that the business of issuing such tickets could not be protected, but each separate occasion of the exercise of the right to issue non-transferable tickets must be the occasion of an independent suit. He did not hold that the tickets must be actually in existence and outstanding before preventive reief could be applied. The suit could be brought before the issuance of the tickets. How long before is not indicated. The record does not contain the reasons or opinion upon which the final decree was based.

We have never been able to understand why an injunction to the full extent prayed for did not follow, as a matter of course, from the principals of law clearly announced and applied by the Court up to the final decree. Assuming the law to be as declared by the Court, what injustice would be done defendants by enjoining them from trafficking in any non-transferable tickets of complainant? To say that complainant must wait until it has actually issued and sold the tickets, is to postpone the relief until too late to be of any benfit. To say that complainant must bring a separate suit for every particular kind of special rate ticket it proposes to issue, and a separate suit on every occasion when it, or any connec-

tion, proposes to issue non-transferable tickets, is to require a multiplicity of suits and defeat the very ends and purposes of equitable relief; and this, without any reason or necessity therefor, since the ground of relief is the same in all, a non-transferable ticket purporting on its face to be such, containing a contract that it is not good if sold by the original purchaser, and an intention on the part of defendants, admitted in this case, to deal and traffic in all such tickets.

The original and primary office of a writ of an injunction is to **prevent** a wrong or injury from being done.

"An injunction is a judicial process issuing out of a Court of Chancery, whereby a party is required to do or refrain from doing a particular thing. The most ordinary form of injunction is that which operates to prevent the performance of an act. The other form of injunction commands that an act shall be done." 16 Am. & Eng Ency. Law. (2d. Ed.) p. 342.

"The prevention of vexatious litigation and of a multiplicity of suits constitute a favorite ground for the exercise of the jurisdiction of equity by way of injunction; and it may be laid down as a general rule that whenever the rights of a party aggrieved can not be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, a court of equity may properly interpose and afford relief by injunction." High on Injunctions (4 Ed.) 912.

Cases involving threatened frauds, where the defendant is insolvent, or the threatened injury would be irreparable, or where the redress of the injury would result in a multiplicity of suits, fall within the classes of cases properly cognizable in Courts of Equity. Preventive in-

junctions necessarily operate upon an unperformed and unexecuted act, and prevent a threatened, but non-existent, injury. It is not confined to a particular act; its object is to protect from continuing and recurring trespasses or wrongful acts. In protecting a person's business from unfair competition, the Courts do not limit the injunction to certain specific articles offered for sale at certain specific times or to certain specific persons. So in cases of boycotts, the preventive relief extends to the future, and is not limited in point of time. In the present case, and in the analogous cases, it is the business of the complainant which is to be protected, the right to conduct it free from wrongful interference by defendants. Such a right is specific, definite property, a concrete right. It includes the right to issue non-transferable tickets in the future. Defendants' expressed intention to interfere wrongfully with this right or business of complainant at all times in the future presents also a case of concrete threatened injury. In asking the Court to enjoin for the future this threatened interference with its business, complainant is manifestly not dealing with a moot case or an abstract right.

It cannot be said that complainant is asking the Court to establish or declare a new rule of law or to **create** rights in one person or **impose** duties upon another. It simply asks that rights which already exists, and are recognized, shall be protected, and that duties which are already imposed by law shall be enforced. The rule of civil conduct which the Court is here asked to enforce, and not to create, is that defendants shall not, by wrongful means, interfere with the existing right of complainant to carry on its business. There is a distinction between the act of creating future rights and the act of

preventing future infringements of existing rights. Complainant does not ask the Court to create rights in the future, but it does ask the Court to prevent future infringements of its existing right to carry on its business; and in asking this, it no more asks the Court to establish a rule of civil conduct than is always asked of the Courts when they are called on to enjoin future trespasses, future infringement of trade marks, future acts of unfair trade, or any other future act, to restrain which preventive injunctions have been issued from time immemorial.

In the case of a trespass or any wrongful interference with a legitimate business, where the acts complained of were of a continuing nature, whose constant recurrence rendered the remedy at law inadequate, unless by a multiplicity of suits, Courts of Equity have always granted injunctive relief.

In **Donovan vs. Pennsylvania Company**, 199 U. S., 279, this Court held that where there is a continuing trespass by a number of parties and a suit at law could only determine a particular controversy at a particular time, a Court of Equity may meet such an unusual emergency and by a comprehensive decree determine finally the controversy between the parties, avoid a multiplicity of suits, and conserve the public interest; and in affirming the injunction granted to the railroad company in that case, Mr. Justice Harlan said, (p. 304):

"It only remains to inquire as to the competency of a Court of Equity to give the railroad company the relief it sought. The defendants insist that equity cannot properly interfere. But the inadequacy of a legal remedy in such a case as this, is quite apparent. According to the record, the attempt of the defendants, despite the objections of the company, to use its station house and

depot grounds for the purpose of meeting passengers and soliciting their patronage, was of constant, daily, almost hourly, occurrence. The case was one of a continuing trespass involving injury of a permanent nature. A suit at law could only have determined a particular wrong occurring on a particular occasion, and would not reach other wrongs of like character that would occur almost every hour of each day as passengers arrived at the station of the company. The same state of things existed in reference to such use of the sidewalk in front of the passenger station, as unduly interfered with the rights of passengers arriving and departing. Only a Court of Equity was competent to meet such an unusual emergency and by a comprehensive decree determine finally and once for all the entire controversy between the parties—thus avoiding a multiplicity of suits and conserving the public interests."

In that case the defendants, hackmen in the City of Chicago, claimed the right to enter the passenger station of the complainant company for the purpose only of soliciting for themselves the custom or patronage or passengers, while the railroad company claimed the right to forbid such acts of the defendants, having made an exclusive arrangement with one particular transfer company to take care of that patronage. In the case at bar the appellants claim the right to buy and sell the non-transferable tickets of the appellee railroad company, and the appellee claims the right to forbid such acts.

This is clearly a case in which, following the language of Mr. Justice Harlan just cited "A Court of Equity is competent by a comprehensive decree to determine finally and once for all the entire controversy between the parties."

See also:

Ellis vs. Blue Mountain Forest Association, 41 Atl. Rep. 856 (New Hampshire.)

Kellogg vs. King, 46 Pac. Rep.., 166 (California.)

Blondell vs. Consol Gas Co. 43 Atl. Rep. 817, (Maryland.)

Kreuger vs. Wisconsin Tel. Co. 81 N. W. Rep. 1041, (Wisconsin.)

Wheelock vs. Noonan, 15 N. E. Rep. 67, (New York.)

In **Scott vs. Donald,** 165 U. S. 107, this Court recognized the principle, that the right to do business in a particular way is a proper subject of protection by a court of equity, irrespective of whether the subject or instrument of that business be in existence or not, or rather, whether it be in actual or potential existence. In that case a bill was filed in equity against various persons claiming to act as constables of the State of South Carolina, under what was known as the Dispensary Law, to protect by injunction the alleged right of the complainant to import, for his use, wines and liquors, the product of other States and foreign countries. The Court did not hold that no relief could be obtained, except as to articles already imported, or in course of importation, but protected by injunction the right to import.

In overruling a contention similar to that now urged by defendants, Judge Thayer, in the case of **I. C. R. Co. vs. Caffrey,** said:

"In support of the contention that the bills of complaint do not state a case of equitable cognizance, it is said that they do not disclose a real controversy, but merely seek to have the Court lay down a rule of action for the future guidance of the defendants, and for the violation of which the defendants may be punished, not in the usual way, but by proceedings for contempt. The

same may be said of every other application for an injunctive relief. Every order of injunction, when granted, prescribes a rule of action in that it forbids the party to whom it is addressed to do certain acts in the future. It is true that no Court can restrain one from doing a given act, no matter how wrongful it may be, unless the act has been threatened, nor unless it apears that there is imminent danger that it will be done. It may be conceded that it is not the function of Courts of Equity to make laws, or to command people not to do a given act when they have not threatened to do it, or given evidence of such an intention. But when one had manifested his purpose to commit a legal wrong and the act is of such a nature that the injured party cannot obtain adequate redress in a Court of law, then a Court of Equity may intervene.

"The bills of complainant show very clearly that the defendants intended to do as they have hitherto done, that is, buy the unused portions of non-transferable tickets and resell them to third parties to be used. This is their principal business, out of which they derive most profit, and it is plain that they intend to follow this calling and to buy and sell unused portions of such non-transferable excursion and commutation tickets as the complainants now sell, or may have occasion to sell in the future for the accomodation of the public. Of the imminence of the threatened wrong, there can be no doubt. There is just as little doubt that acts of this nature will be committed so frequently and that they will be so difficult to establish by proof, and if so established in a Court of law require the prosecution of so many actions that the remedy at law will prove to be inadequate. It is also manifest that the loss to be apprehended as a natural result of the threatened wrong will be great and irreparable.

"The defendants are doubtless entitled to act as ticket brokers, that is to say they are entitled to sell any tickets which the complainants or other railroad companies empower them to sell. So they may buy or sell unused por-

tions of such tickets as are sold by railroad companies without any limitations as to the persons by whom they may be used. But when they engage in the business of buying tickets that are non-transferable, and by so doing interfere with the complainants' business and subject them to loss and expense, and assist others to perpetuate a fraud on the complainants, they are engaged in an unlawful calling productive of injury to others, and acts of that nature can be rightfully enjoined.

Hopkins vs. Oxley Stave Co., 83 Fed. Rep. 912, 919, and cases there cited.

Sherry vs. Perkins, 147 Mass., 212.

Kinner vs. Lake Shore & M. S. Ry. Co., 69 N. E. Rep. (Ohio), 614.

Shubach vs. McDonald, 78 S. W. .Rep (Mo).

National Telegraphic News Co. vs. Western Union Tel. Co., 56 C. C. A., 198.

In re Debs, 158 U. S., 564.

"Indeed it would be a misfortune if Courts of Equity were powerless to redress grievances of that kind."

See also opinion of Judge Dixon, of the District Court of Colorado, printed in pamphlet form.

Defendants rely upon the dissenting opinion in **Schubach vs. McDonald**, 78 S. W. Rep., 1020 (Missouri). What is there said is sufficiently answered in the majority opinion, from which we ask leave to quote as follows:

"As to the tickets to be issued and sold hereafter, the railroads have a right to issue and sell tickets of such character as shall express on their face that they have been issued at a reduced rate and are non-transferable, and the ticket brokers assert a right to buy and sell and deal in them, notwithstanding the terms thereof, and notwithstanding the original purchaser could confer no rights upon anyone thereunder. There is, therefore,

an existent property right of the railroads which the ticket brokers say they intend to invade, the danger is imminent, and under the allegations of the petition, the injury will be irreparable, and in the very nature of the business, the injury cannot be adequately redressed by an action at law, or in any other manner than by a preventive injunction. A proper case for the exercise of the powers of a Court of Equity by the preventive injunction was, therefore, also presented for the determination of the Court as to this branch of the case. And in granting such preventive injunctions the Court of Equity does not prescribe a rule of civil conduct, nor invade the province of the legislative branch of the government, nor does it establish a 'government by injunction.' It only does what has always been done by Courts of Equity since their adoption into the body of our institutions—it enforces the rules of civil conduct prescribed by the organic law or the statute law, or that arise naturally and regulate all men, by guarding the rights of one citizen against illegal invasion and irreparable injury by another citizen, and which the citizen of his own force is unable to guard for himself. And in doing thereof, Courts of Equity recognize no forms, no technicalities, no delays, and no shadows, but act according to the dictates of good conscience, good morals, good conduct, and good government, and they compel every man to act right, and to respect the rights of others, whether his conscience is quick enough to appreciate the difference between right and wrong or not.

There is no merit in the contention that by granting the injunction in question, and in this case, the Court has infringed upon the powers of the legislative branch of the Government. The Court has created no right in any one. The Court has simply protected rights that are natural or were created by the legislature.

The right asserted by the railroads and denied and threatened by the ticket brokers, is a right that is natural to mankind. It is a right that the legislature of this State

and the Congress of the United States have expressly conferred upon the corporation railroads, and which the Supreme Court of the United States has expressly declared they possess. It is a right that is guaranteed to every man by the organic law of the land, a right to contract concerning a legal subject matter. Such right is property within the meaning of the law. The ticket brokers deny the existence of that right, and threaten to invade it. The law affords no adequate remedy for such an infringement of such a right. The damage will necessarily and obviously be irreparable. This being true, a concrete case for injunctive relief is presented, and in the granting of such relief it cannot be justly or fairly said that the Courts invade the prerogatives of the law making power in any manner whatever. That power has already created the identical right claimed, and it is the duty of the Courts to protect that right in the same manner and to the same extent that they protect any other property rights that are possessed by any citizen. The railroads are not entitled to, and are not accorded, any right in this regard that is not as fully possessed by any citizen and that would not be protected in the same manner if such protection was invoked by the humblest citizen."

The limitations which the Circuit Court placed upon the relief granted to complainant are not only inconsistent with the principles upon which equity gives relief, but they amount practically to a denial of any effective relief. If complainant must institute a separate suit to prevent the scalping of each issue of a non-transferable ticket, issued either by itself or by other railroads for use over its lines, it must bring suits almost daily, and would be involved in about as great a multiplicity of suits as if it had been denied any equitable relief and required to bring a separate suit for damages on every occasion of the sale of any such tickets. Occasions for the issuance of

non-transferable reduced rate tickets are constantly occurring all over the country, e. g.: Grand Army or Confederate Veterans' Reunions, Christian Endeavor, or Elks, or Knights Templar Reunions, Law or Medical or Commercial Conventions, Expositions, State Fairs, Home Seekers' Tickets, Labor Parties Tickets, Week End Excursions, etc., etc. There is scarcely any period of the year when complainant has not a property interest in such non-transferable tickets, either issued by itself over other lines, or issued by other railroad companies, with whom it has connections, over some portion of the lines of complainant. On all these special occasions the "scalper" is busy, not only at the place where the convention or reunion takes place, but at all important cities in the United States. By means of ticket brokerage associations or other methods of interchange he is able, directly or through correspondents, to deal in special rate non-transferable tickets at all important points.

For instance, at the time of some reunion at Louisville, a person desiring to travel to that city may go to a ticket scalper in New Orleans and want to buy a ticket to Louisville. The scalper will direct him to purchase of the Louisville and Nashville Railroad Company, at this special rate, a round trip ticket to Louisville, and may give the passenger a rebate order on his correspondent in Louisville, who will pay the rebate, take up the return portion of the ticket, and sell it to the next one calling for a ticket to New Orleans. As non-transferable special rate tickets are usually good for thirty days, there are few days in the year when there are no such tickets of this complainant, or in which it is interested, available to defendants for scalping purposes. The rebate order is simply one of the methods of scalping. It has

been held to be within the prohibition of an injunction against buying and selling non-transferable tickets.

We submit that the error complained of, which would require complainant to be incessantly knocking at the Court doors for injunctive relief, has been shown to exist, and that complainant is entitled to an injunction broad enough to cure the evil complained of. As we have argued above, the lower court seems to have confused the occasions on account of which non-transferable tickets are issued with the busines itself. It is the business that we are seeking to protect; the occasion is only an incident.

The foregoing is the argument presented to the Circuit Court of Appeals in support of complainant's right to an injunction protecting its business of issuing reduced rate non-transferable tickets. Since this case was decided by the Court of Appeals, a decision has been rendered covering the same point in **Pennsylvania Company vs. Bay**, *supra*, from which we quote as follows:

"This brings us to the crux of the present proceeding, and that is the power of the court to enjoin the defendants from dealing in the future in special non-transferable tickets not yet issued, as to which the special occasion for their issuance has not arrived or even been specifically conceived. For a time the power of the railroads to issue such tickets good only in the hands of the first purchaser, was questioned by the courts, but as occasions for special accomodations on the part of the traveling public increased in number, the necessity for them was recognized, and the courts of almost every state in the Union and the Supreme Court of the United States have held them valid. With a few exceptions, the states have enacted laws for their protection and for the prosecution of those engaging in the purchase, sale, and manipulation of such tickets.

"Defendants urge that the relief sought by the bill and recommended by the master, trespasses upon the powers of the legislative department of the government; that it is an attempt to lay down and enforce a course of action. In a limited sense, every injunctional order looking to the prevention of wrongful acts against property is necessarily a rule of action. The decision of the Supreme Court of the United States in **N. Y. & C. Ry. Co. vs. The Interstate Commerce Commission**, 200 U. S., 404, is not at all here in point. There it was sought, as the court says, to remove the carrier from the protection of the law of the land and require it thereafter, to conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. The proceeding was instituted under the Interstate Commerce Act. It was not a proceeding to protect property rights in existence. It was an attempt to re-enact the statute into a decree. The case lacks every element urged in support of the present suit and manifestly could not have been sustained by the Supreme Court. It is true that the New York Courts and some others have taken a position antagonistic to that herein stated, while those above cited and many others have adhered to the principles upon which it is now sought to decide this case. Conceding, however, that the suit is one to protect the right of complainant to issue limited tickets from time to time, and that defendants are threatening to invade that right, it seems to me the reasoning of the courts in the St. Louis World's Fair cases and of the other courts above quoted from, clearly answers and disposes of the objections urged to the granting of this relief by the New York Courts. The attempt of defendant's counsel to discredit the opinions of the several courts which have rendered these decisions on the ground of popular demand and self-interest does not appeal to the judgment of the court. The opinions speak for themselves. The question involved is a large one. It affects both the railroads and the public. It is now before the Supreme Court and will

be there finally settled. In view of this fact, it was the purpose of the court to hold the case until that court had disposed of the matter before it; but at the request of counsel for both parties hereto, this decision is rendered.

"The court is of the opinion that equity has full jurisdiction at this time to restrain defendants from dealing in complainant's non-transferable tickets issued and to be issued, upon the broad propositions: 1st, that complainant has a present property interest in the right to issue such evidences of transportation, whether already issued or to be issued from time to time in the future, and to have the same maintained as non-transferable; and 2nd, that defendants are threatening to seize upon and deal in, for their own advantage, such non-transferable tickets, to the wrong and in fraud of complainant's present business rights, contrary to law.

"The exceptions to the report are overruled, the report is confirmed, and a perpetual injunction granted as prayed. Complainant's counsel may prepare and present a decree in accordance herewith."

Before the Court reaches the question now under discussion it will have passed upon the right of complainant to injunctive relief against the scalping of particular issues of non-transferable tickets. If the decision is against complainant, that is an end of the case. If the decision is against defendants, it will have been decided that complainant has a right to issue tickets which declare on their face that they are not good for passage except in the hands of the original purchaser; that buying such tickets from the original purchasers and selling them to third persons to be used by the latter, is a wrongful act on the part of defendants causing damage to complainant; and that the remedy at law is inadequate and an injunction can properly issue to restrain the unlawful interference by defendants with complainant's business.

Hence, in our argument in suport of an injunction covering future issues of non-transferable tickets, we can assume that complainant has a right to issue such tickets; that defendants have no right to deal in or "scalp" such tickets; and that the course of conduct which they declare they intend to pursue is wrongful and will inflict damages upon complainant for which the remedy at law is inadequate. It will be remembered that the bill avers and the answer admits that complainant had been for some time, and still is and will continue to be, engaged in the business of issuing such non-transferable tickets, and that defendants had been for some time, and still are and intend in the future to be, engaged in the business of "scalping" such tickets whenever issued.

Considering these admitted or properly assumed premises it is difficult to attach any weight to the complaint that defendants' long established and lawful ticket brokerage business will be destroyed by the injunction sought. The injunction is to be limited to the "scalping" of tickets which defendants cannot lawfully deal in and which they, therefore, have no business to buy or sell. If their whole business consists in "scalping" such tickets, then their whole business is nothing but an unlawful depredation upon the lawful business of complainant and others. It is also difficult to appreciate the force of the argument that, in extending the injunction to cover future issues of tickets, i. e., making the injunction preventive, the Court of Appeals was exercising legislative and not judicial functions, and was creating rights and duties and prescribing a course of civil conduct. What rights or duties did the court create? Not the right to issue non-transferable tickets. That already existed by virtue of the law as construed by this Court. Not the

duty of defendants to abstain from injuring the business of complainant by interfering with its lawful contracts and procuring the violation thereof. That duty has always existed, as declared by this Court in **Angle vs. Chicago, etc., R. Co.**, *supra*. Not the right to equitable relief when the remedy at law is inadequate or to injunctive relief against non-existing but threatened and impending injuries. That came into existence with the Courts of Equity. As to prescribing a course of civil conduct, that is necessarily involved in every injunctive order. Does not an injunction prohibiting a scalper from buying and selling a particular issue of non-transferable tickets prescribe a course of civil conduct? When the Court enjoins a band of strikers from interfering, by threats and violence, with the performance of the contract of employment on the part of those hired to fill their places, does it not prescribe a course of civil conduct? Does not the injunction approved by this Court in **Swift & Company vs. United States** (*infra*) prescribe a course of civil conduct?

The injunction which the Court of Appeals directed to be issued is not fairly amenable to the objection that it does not deal with an actual concrete case. The pleadings clearly presented just the case which the injunction covered. The bill described with all necessary detail the kind of tickets complainant was in the habit of issuing, setting forth the terms and annexing illustrative samples of tickets, from which it clearly appeared that they could not be used by others than the original purchasers without a violation of the contracts therein contained. It showed the frequency of such issues of tickets, making the business of issuing them practically a continuous business. It alleged, with all necessary fullness and

definiteness, the continued interference in the past and the intended interference in the future with this business by defendants, and made the other averments and charges with which your Honors are now familiar. Defendants in their answer admitted that complainant was engaged in the business described, that it did issue non-transferable tickets of the form and character shown by the sample exhibits, that defendants were in the business of "scalping" such tickets, and that as often as complainant issued such tickets in the future defendants intended to "scalp" them. There is nothing "moot" or "abstract" in the allegations and admissions or in the issues created thereby. The business of complainant and the business of defendant were both actually existing and were intended to continue to exist in the future. The complainant's business was a legitimate one. The business of defendants (that of "scalping" non-transferable tickets) was illegitimate. The conduct of defendants' business necessarily involved a wrongful interference with complainant's business and repeated, constant and continuous wrongful acts against complainant, causing it repeated, constant and continuous damage and injury for which it had no adequate remedy at law. How can it be said that the Court did not have before it a tangible, concrete case?

It is not true that the injunction authorized by the Court of Appeals is so vague, general and indefinite as to operate unfairly or oppressively against defendants. The answer does not intimate any difficulty in distinguishing between a transferable ticket and one by its terms non-transferable. In railroad and scalping circles transferable and non-transferable tickets are as well known and as well understood as negotiable and non-

negotiable notes in commercial circles. There is nothing in the record to support the contention that defendants may not be able to recognize a non-transferable ticket when they see it. If necessary (but we do not admit the necessity) the decree might define non-transferable tickets as those containing a provision that they are good only in hands of the original purchaser or that they are not good for passage if transferred by the original purchaser, or the like. If such a stipulation is reasonable and creates a legally binding and enforceable contract, there is no force in the objection that complainant may so contract in all tickets sold by it and thus leave no tickets for defendants to "scalp." The Railroad Company owes no duty in the premises to ticket brokers. If making tickets good only in the hands of the original purchaser is unreasonable or oppressive, the persons to complain are the original purchasers of such tickets and the remedy is legislation denying or curtailing the right to issue non-transferable tickets. Allowing ticket brokers to persuade and assist people to violate their contracts, is not a necessary or proper remedy for an abuse on the part of railroad companies of the right to issue non-transferable tickets. In this connection we beg to refer to the discussion contained on p. 1015 of the opinion in **Samuelson vs. State,** *supra.* But if your Honors should be of the opinion that the simple words "non-transferable," used in the decree to define the tickets traffic in which is forbidden, are too comprehensive, we suggest that the decree may be modified so as to make the injunction cover only those tickets which by their terms are non-transferable reduced rate tickets and good only for the transportation of the original purchasers thereof, or by their terms are required to be signed by the original purchas-

ers thereof. Ticket scalping is not only a mischievous business, essentially based on fraud and deception, but it operates to defeat the objects and policy of the Interstate Commerce Law and the Railroad Commission laws of the several States. A common purpose of all these laws is to secure the transportation of persons and property at published rates open to all the public. The effect of ticket scalping is to permit a part of the public, having elastic consciences, to secure transportation at secret rates less than is contemporaneously paid by the more honest members of the community. It ought not to be regarded as a fatal objection to a decree that it will cripple a business which the Interstate Commerce Commission has condemned as iniquitous, which the courts generally have pronounced to be mischievous and dishonest, and which so many states have sought to legislate out of existence.

The relief we seek is not inconsistent with the principles of law announced in **New Haven Railroad vs. Interstate Commerce Commission,** 200 U. S. 361, or in **Swift and Company vs. United States,** 196 U. S. 371. We shall not discuss at length the meaning and scope of these cases, because we do not feel that we can add anything to your Honors' information on the subject. In the later case the Commission complained of the transportation of coal by the Chesapeake and Ohio Railroad for the New Haven Railroad at less than tariff rates and at less than cost of transportation, the coal in question being 60,000 tons which had been sold by the Chesapeake and Ohio to the New Haven Railroad. The defense was that if such difference in rates existed, it was a loss suffered by the Chesapeake and Ohio, not from taking less than the published rates, but because it had received less as seller than the coal cost, and, moreover, that even if it had not

a lawful right thus to impute the payment of the price of the coal, the Chesapeake and Ohio had, in fact, received much more for the coal than the price in money agreed on, in the shape of the settlement thereby of a large claim for damages against it by the New Haven Railroad. The Commission was accorded an injunction restraining the acts specifically complained of and restraining defendants from in any manner executing or performing the contracts set up in their defense and from in any manner discharging or satisfying any obligation or seeming obligation arising therefrom or from any arrangement or agreement made in lieu thereof. It was sought in this Court to have the decree enlarged so as to enjoin the Chesapeake and Ohio from transporting coal from one State to or through any other State for the New Haven Railroad, or for any person, firm, or company, at less than its duly established freight rates in force at the time, and from failing to observe its published tariffs, or from giving to the New Haven Railroad or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable preference or advantage. Similar injunctions to obey the law generally was sought against the New Haven Railroad. This Court declared that to go beyond the contracts and transactions complained of in the bill and to command defendants in general terms not to violate the Interstate Commerce Act in the future in any particular, would be violative of the most elementary principles of justice. It requires no argument to show that the case we have just been discussing and the case at bar are radically different. There would have been some analogy between the two if, the Commission alleging and defendants admitting that the two Railroad Companies were in the habit of repeatedly making such contracts

and justifying thereunder the transportation of coal at discriminatory rates and that, unless restrained, they would continue in the future to make such contracts and shipments thereunder, the Court had been asked to enjoin the defendants in the future from executing or performing such contracts and from discharging or satisfying any obligations or seeming obligations thereunder in respect to the transportation of coal covered thereby at less than the published freight rates. If such a case had been presented by the bill and answer, we believe that the decision of the Court would have afforded a strong precedent for the relief we now seek.

It seems to us that the form of injunction which received the sanction of this Court in **Swift and Company vs. United States,** is amenable to all the objections now urged against the scope of the injunction authorized by the Court of Appeals in the present case. The defendants were enjoined for all time in the future from entering into, taking part in, or performing any contract, combination or conspiracy, in any of the forms or by any of the means set forth in the bill, the purpose or effect of which would be, as to interstate commerce in fresh meats, a restraint of trade, in violation of the provisions of the Act of Congress approved July 2, 1890. They were further enjoined from violating the provisions of the Act by combining or conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of interstate commerce in fresh meats, by demanding, obtaining or receiving from railroads or other common carriers transporting such fresh meats, either directly or by means of rebates, or by any other device, transportation of such meats to other States at less than the regular published rates in force at the time. The

foregoing is the substance of the injunction approved by this Court. It enjoins defendants for all time in the future from making contracts and engaging in transactions of a certain character which the court deemed unlawful. It is just as guilty as the injunction now on trial of prescribing a rule of civil conduct by restraining the continuance of a course of conduct condemned by the Court.

It will not be unprofitable to consider more in detail the consequences of withholding relief as to future issues of non-transferable tickets. We shall again assume that an injunction may properly be granted as to a particular issue of tickets containing a contract against their transfer. The bill alleges, and the answer admits, that every year complainant issues non-tranferable excursion tickets on the occasion of the Mardi Gras festival in New Orleans, and that defendants as often "scalp" the same. If the argument of the other side on this branch of the case and the decision of the Circuit Court are correct, complainant must every year, when it puts out its Mardi Gras tickets, bring a bill in equity against defendants for an injunction to restrain the scalping of that year's tickets. Assuming, as we have a right to do, defendants' admissions as to their intention to buy and sell the same, complainant will obtain the relief sought. But a new suit must be brought the next year and the next and so on indefinitely. The evidence shows that every year, when the hot weather has ceased to make New Orleans a place of exodus and the trend of travel turns toward it, complainant issues reduced rate round trip non-transferable tickets, called "Winter Tourist" tickets. A sample form is in the record. It does not differ in any essential respect from Mardi Gras tickets. These tickets are like-

wise admitedly scalped by defendants. Complainant is entitled to injunctive relief in respect to these tickets. Must it bring a separate suit every year at the beginning of each winter season? Or will enjoining in November the scalping of tickets which may not be issued until December be considered as prescibing a rule of civil conduct or dealing with a moot case, and will complainant, if it wishes the protection to which it is entitled, be required to come into court with a new suit every month? If every month, why not every week? Complainant is repeatedly, almost daily, issuing non-transferable tickets on the frequently recurring occasions of conventions, fairs, etc. If it is to receive the protection, which for the purpose of this argument it must be assumed to be entitled to, it must bring a separate bill on each of these occasions. It would thus be perpetually involved in a multiplicity of suits to obtain relief which is granted, among other reasons, to avoid a multiplicity of suits. What principle of law would be violated, what practical difficulties would be encountered, what injustice would be done defendants, by permitting complainant to protect, in one suit and by one preventive injunction, from defendants' unlawful interference its business of issuing Mardi Gras excursion tickets from year to year? Why should not the suit embrace the same kind of tickets annually issued and called Winter Tourist tickets, and the same kind of business involved in the occasional issue of like tickets for conventions and other public gatherings? Why should not the relief be co-extensive with the threatened wrong, when the answer admits the business of issuing such tickets and admits that defendants intend to interfere therewith in a manner which, for the purposes of this argument, must be assumed to be wrongful

and productive of irreparable injury? We know of no reason why this case should furnish an example of the refusal of a court of equity to follow one of its fundamental maxims—to furnish full and complete relief in the case before it and as far as possible to avoid the necessity of further litigation.

IV. ERRORS ASSIGNED BY CROSS APPELLANTS IN THE COURT OF APPEALS.

The refusal of the Circuit Court to hold that the bill was multifarious was not assigned as error on the cross appeal. Nor was there any assignment of error on account of the failure of the court to hold that it was without jurisdiction by reason of the citizenship of the parties. The complaint was that the Circuit Court was without jurisdiction because the amount involved was less than the lowest limit of the Court's jurisdiction and because the Court erred in not allowing the plea to the jurisdiction. This contention has been sufficiently discussed under the first general heading of this argument. The errors assigned, that there was an adequate remedy at law, and that complainants sustained no damages, have been answered under the second heading of this argument. The contention that defendants have an inalienable right under the declared policy of the State of Louisiana and under the Fifth Amendment of the Constitution to do the acts which complainant asked that they may be enjoined from doing, is so manifestly without merit as to require no further discussion. We beg leave in this connection to refer the Court to the opinion of the Circuit Court **(T. p.p. 23)**.

V. THE FORM OF INJUNCTION PRAYED FOR.

No error has been assigned to the form of injunction except as above stated. As shown in Article XVIII of the bill, the injunction should, in order to afford complete and effective relief, be broad enough to include all who knowingly do what the order of the Court prohibits defendants from doing, or who aid or abet defendants in violating the injunction, or in defeating the object and purpose thereof. That the Court has power to issue an injunction of such scope and effect was not questioned in the lower court.

See **In Re Debs,** 158 U. S. 564, 570-1; **Ex Parte Lennon,** 166 U. S. 548.

We ask the Court to decree that complainant is entitled to an injunction prohibiting the defendants by name and each of them, his or their agents, servants, employees, assigns, successor or successors, and all others acting for defendants, or any of them, and all persons whomsoever though not named therein, from and after the time when they severally have knowledge of the existence of the injunction, from buying, selling, dealing in or soliciting the purchase or sale of any ticket or tickets or the return coupons or unused portions thereof, issued by complainant, or by any other railroad company for use over complainant's lines of railways, or any part of them which, by the terms thereof, are non-transferable, or from soliciting, inducing, encouraging or procuring any persons other than the original purchaser of

such tickets, to use or attempt to use said tickets for passage on any train of complainant.

Respectfully submitted,

GEORGE DENEGRE,

JOSEPH PAXTON BLAIR,

Solicitors for Louisville and Nashville Railroad Company, Complainant and Respondent.

BRODE B. DAVIS,
Of Counsel.

BITTERMAN *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 34. Argued November 4, 1907.—Decided December 2, 1907.

Railroad companies have the right to sell non-transferable reduced rate excursion tickets, *Mosher* v. *Railroad Co.*, 127 U. S. 390; and the non-transferability and forfeiture embodied in such tickets is not only binding upon the original purchaser and any one subsequently acquiring them but, under the provisions of § 22 of the act to regulate commerce, 24 Stat. 387, 25 Stat. 862, it is the duty of the railroad company to prevent the wrongful use of such tickets and the obtaining of a preference thereby by anyone other than the original purchaser.

An actionable wrong is committed by one who maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other, *Angle* v. *Chicago & St. Paul Railway Co.*, 151 U. S. 1; and this principle applies to carrying on the business of purchasing and selling non-transferable reduced rate railroad tickets for profit to the injury of the railroad company issuing them, and this even though the ingredient of actual malice, in the sense of personal ill will, does not exist.

When, as in this case, the dealings of a class of speculators in non-transferable

tickets have assumed great magnitude, involving large cost and risk to the railroad company in preventing the wrongful use of such tickets, and the parties so dealing in them have expressly declared their intention of continuing so to do, a court of equity has power to grant relief by injunction.

Every injunction contemplates the enforcement, as against the party enjoined, of a rule of conduct for the future as to the wrongs to which the injunction relates, and a court of equity may extend an injunction so as to restrain the defendants from dealing not only in non-transferable tickets already issued by complainant, but also in all tickets of a similar nature which shall be issued in the future; and the issuing of such an injunction does not amount to an exercise of legislative, as distinct from judicial, power and a denial of due process of law.

Whether the jurisdictional amount is involved is to be determined not by the mere pecuniary damage resulting from the acts complained of, but also by the value of the business to be protected and the rights of property which complainants seek to have recognized and enforced. *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322.

Where defendants do not formally plead to the jurisdiction it is not incumbent upon complainant to offer proof in support of the averment that the amount involved exceeds the jurisdictional amount as to each defendant.

No adequate remedy at law exists to redress the wrong done to a railroad company by wrongfully dealing in vast numbers of its non-transferable reduced rate excursion tickets which will deprive the company of its right to resort to equity to restrain such wrong dealings.

An action against a number of defendants is not open to the objections of multifariousness and of misjoinder of parties if the defendants' acts are of a like character, the operation and effect whereof upon the rights of complainants are identical and in which the same relief is sought against all defendants, and the defenses to be interposed are necessarily common to all defendants and involve the same legal questions. *Hale* v. *Allinson*, 188 U. S. 56, 77.

144 Fed. Rep. 34, affirmed.

UPON a bill filed on behalf of the Louisville and Nashville Railroad Company, the Circuit Court of the United States for the Eastern District of Louisiana entered a decree perpetually enjoining the petitioners herein and four other ticket brokers, engaged in business in the city of New Orleans, from dealing in non-transferable round trip tickets issued at reduced rates for passage over the lines of railway of the complainant on account of the United Confederate Veterans' Reunion and the Mardi Gras celebration held in the city of New Orleans in the

years 1903 and 1904 respectively. On an appeal prosecuted by the railroad company complaining of the limited relief awarded, the Circuit Court of Appeals held that the defendant should also be enjoined generally from dealing in non-transferable round trip reduced rate tickets whenever issued by the complainant, and ordered the cause to be remanded to the Circuit Court with directions to enter a decree in accordance with the views expressed in the opinion. 144 Fed. Rep. 34. A writ of certiorari was thereupon allowed.

We summarize the averments of the complaint and answer. It was averred in the bill that complainant was a Kentucky corporation, operating about three thousand miles of railway for the carriage of passengers, baggage, mail, express and freight, its lines of road extending from New Orleans through various States, and making connections by which it reached all railroad stations in the United States, Canada and Mexico. The seven persons named as defendants were averred to be citizens and residents of Louisiana, each engaged in the city of New Orleans as a ticket broker or scalper in the business of buying and selling the unused return portions of railroad passenger tickets, especially excursion or special rate tickets issued on occasions of fairs, expositions, conventions and the like. It was further averred that the defendants were joined in the bill, "because their business and transactions complained of are in act, purpose and effect identical, and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them."

Six articles or paragraphs of the bill related to an approaching reunion of United Confederate Veterans to be held in the city of New Orleans, which it was expected would necessitate the transportation by the railroads entering New Orleans of one hundred thousand visitors, one-fourth of which number would pass over the lines of railway of the complainant. A necessity was alleged to exist for special reduced rates of fare to secure a large attendance at such reunion, and it was averred that a rate of one cent a mile, one-third the regular rate, had

been agreed upon for non-transferable round trip reduced rate tickets which were to be issued for the occasion, and it was stated "that among the conditions on the face of said ticket, which ticket contract is signed by the original purchaser and the company, is one, that said ticket is non-transferable, and if presented by any other than the original purchaser, who is required to sign the same at date of purchase, it will not be honored but will be forfeited, and any agent or conductor of any of the lines over which it reads shall have the right to take up and cancel the entire ticket." And for various alleged reasons, based mainly upon the large number of expected purchasers, it was averred that the return portion of each ticket was not required to be signed by the original purchaser or presented to an agent of the complainant in the city of New Orleans for the purpose of the identification of the holder as the purchaser of the ticket.

It was averred that each defendant was accustomed to buy and sell the return coupons of non-transferable tickets, for the express purpose, and no other, of putting them in the hands of purchasers to be fraudulently used for passage on the trains of complainant, and it was further averred that the defendants intended in like manner to fraudulently deal in the return portion of the tickets about to be issued for the reunion in question, and that complainant would sustain irreparable injury, for which it would have no adequate remedy at law, unless it was protected from such wrongful acts. It was further averred that unless relief was given the complainant would be compelled to abandon the making of reduced rates for conventions or other assemblies to be held in the city of New Orleans. Averments were also made as to the additional burden which would be cast upon complainant's conductors and train collectors by reason of the practice complained of, the danger which would arise of a multiplicity of suits for damages by reason of errors of such employés in endeavoring to prevent the fraudulent use of such tickets, and it was averred that it would be impossible, in many in-

stances, to discover the persons who were wrongfully traveling upon the tickets and who were bound to pay the lawful and reasonable one way rate for their transportation. The impossibility of securing evidence establishing the facts as to said fraud, the necessity, if such evidence could be obtained, of bringing a multiplicity of suits if a remedy at law was availed of, and the impracticability of estimating in dollars and cents the injury to its business, was set forth as making the remedy at law inadequate, and in addition it was charged that the defendants were financially irresponsible. The existence was also averred of various ticket brokers' associations, the members of which acted in concert. It was averred that a large part of the stock in trade of all ticket brokers and scalpers was the disposal of non-transferable railroad tickets, and it was further averred that ticket brokers and scalpers usually sought to avoid injunctions prohibiting the dealing in such tickets by assigning their business to some other ticket broker not named in the order, and it was averred that in order to afford complete and effective relief "the restraining injunctive orders should be broad enough to include all who knowingly do what the order of court prohibits defendants from doing or who aid or abet defendants in violating the injunction or in defeating the objects and purposes thereof." Finally, it was alleged that the amount involved in the controversy exceeded, exclusive of interest and costs, the sum of five thousand dollars, and that the value of the business, which was sought to be protected, and the rights which the complainant asked to have recognized and enforced, exceeded in the case of each defendant the sum of five thousand dollars, exclusive of interest and costs.

In addition to asking a temporary restraining order the bill prayed that defendants, their agents, etc., "and all other persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the entry of the restraining order and the existence of the injunction herein," should be perpetually enjoined "from buying, selling, dealing

in or soliciting the purchase or sale of any ticket or tickets or the return coupons or unused portions thereof issued by orator or by any other railroad company for use over orator's lines of railway or any part of them which by the terms thereof are non-transferable, or from soliciting, advertising, encouraging or procuring any person other than the original purchaser of such tickets, to use or attempt to use said tickets for passage on any train or trains of orator, especially including the non-transferable round-trip tickets issued for use on the occasion of the United Confederate Veterans' Reunion at New Orleans in May, 1903."

Of the seven persons made defendants, three only appeared and answered, viz., Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, the petitioners in this court, on whose behalf a joint and several answer was filed.

The averments of the bill in respect to the citizenship of the complainant and the character and extent of its railway business was admitted. It was also admitted that the answering defendants were citizens and residents of Louisiana, but it was averred that they were each separately engaged in the ticket brokerage business, duly licensed to conduct such business by the State of Louisiana and the city of New Orleans, and it was expressly denied that the business operations and transactions of all the defendants named in the bill were in act, purpose and effect identical. So also the answer admitted the averments of the bill in respect to the proposed reunion, the large attendance expected, the issue of reduced rate non-transferable tickets and the necessity therefor, and the impracticability of requiring the signing of the return portion of each ticket by the purchaser.

It was admitted in the answer that the tickets usually issued by complainant and its connections when making reduced rates as to excursion tickets purported to be non-transferable and upon condition that if presented by other than the original purchaser, who was supposed to sign the same at the date of purchase, it would not be honored, but would be forfeited, and

that any agent or conductor should have the right to take up and cancel such ticket if presented for passage. In various paragraphs these restrictions or conditions were assailed as impracticable, unenforcible and unlawful, and without consideration, and it was averred that the conditions were never enforced, and that the tickets were issued and bought with that understanding, and that no damage was caused to complainant by a person other than the original purchaser of a non-transferable reduced rate ticket, traveling upon the return portion of such ticket, and that no loss or damage could be caused complainant by reason of the expected dealing by defendants in the reunion tickets referred to in the bill.

It was not only admitted in the answer that the answering defendants had in the past dealt in non-transferable railroad tickets issued by the complainant, but it was expressly declared to be their intention to continue the practice, particularly in respect to the tickets issued on account of the approaching reunion, and coupled with such averment it was asserted that no fraud would be committed or was intended in respect to the dealing in such tickets. We insert in the margin [1] portions of the answer relating to such admissions.

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[1] IX.

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Respondents further admit that, in accordance with the general custom of the trade, they separately buy and sell the return coupons of railway tickets, whether the same are stamped "non-transferable" or not, for the reason that the term "non-transferable" does not import any practical or legal meaning in the business, according to the common understanding of the railways themselves, the ticket brokers, and the traveling public to whom said tickets are issued, who freely sell them to brokers who in turn sell them to other persons desiring to use said tickets for transportation, when genuine and *bona fide*.

* * * * * * * *

Respondents do not deny that the complainant, on occasions of Mardi Gras festivals in the city of New Orleans, have joined in the issuing of reduced rates and the putting out of said so-called "non-transferable" tickets, but, as above set out, the general traveling public, the railways, and the ticket brokers, by common consent, by usage, and by understanding, have

It was denied that the answering defendants were insolvent, but, on the contrary, it was averred that each was able to pay any judgment for damages which might be recovered against him. Denial was made of the allegation of the bill that the

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all treated said tickets as articles of property, and as negotiable and transferable to any person desiring to purchase and travel on the same when genuine and *bona fide;* and respondents deny that these respondents have ever fraudulently dealt in the return coupons of such tickets, or that complainant has ever been damaged in respect thereto, by any act of respondents.

X.

Respondents admit that it is their hope and expectation to buy and sell the return portions of said U. C. V. Reunion tickets, but they deny that they will solicit, induce, or persuade the holders thereof to sell such return portions to respondents upon any false or fraudulent pretense or representation upon the part of respondents.

Respondents admit that they, in common with the general public, have some knowledge of the character and terms of the proposed tickets; that they are informed and believe that such tickets will be issued at low rates, to induce and enable the traveling public to attend said reunion in large numbers; that respondents expect to offer the same for sale, if they shall acquire any of said tickets, and will sell such tickets to persons other than the original purchasers, for such price as they are willing to pay, and that it is no concern of complainant or its connections, or other railways, whether respondents make a profit or a loss in the proposed dealing in said U. C. V. Reunion tickets.

* * * * * * * *

XIV.

Respondents admit that it is the custom and usage of complainant and its connections to issue railroad tickets at reduced rates to the traveling public on various occasions, such as expositions, conventions, Mardi Gras, reunions, or other public gatherings, and that the tickets which are usually issued by complainant purport by their terms to be non-transferable and to constitute a so-called "special contract" in express terms between complainant, the lines issuing the same, all other lines over which the same entitle the holders to travel, and the original purchasers of said tickets, whereby the said original purchasers are forced to agree that said tickets shall not be transferred by them to any other persons; but respondents show that said tickets, when issued by complainant and its connecting lines and other railways, on such occasions as expositions, reunions, conventions, Mardi Gras, and the like, are in practice and general consent and common understanding of the traveling public, the railways, and the ticket brokers, when *bona fide* and genuine tickets, good for the return passage over the lines of said complainant and its connections and other railways, in the

willingness or ability of the complainant to continue issuing special rate tickets would be affected by the failure to obtain the relief sought by the bill, and, in the main, the averments of the article of the bill relating to various ticket brokers' associations were also denied.

As a distinct ground for denying the relief prayed, it was alleged in various forms that the issue of the proposed non-transferable tickets was the result of an unlawful confederation or combination between the various railroads whose roads entered into the city of New Orleans.

Upon the bill and answer a preliminary injunction was issued, restraining the dealing in non-transferable tickets issued for the approaching United Confederate Veterans' Reunion. Replication was duly filed to the answer. Subsequently, upon depositions taken in the cause, and upon affidavit showing the character of non-transferable tickets proposed to be issued

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hands of the holders thereof, whether such holders be the original purchasers or not; that such practice and such understanding are common and general all over the United States; that such tickets are sold and dealt in as legitimate business in every large city, to the knowledge of the complainant, and such tickets are and have been for many years sold by complainant with full knowledge of the fact that they are in practice and general understanding of the traveling public good in the hands of any holder.

XV.

Respondents jointly and severally admit that each of them are and have been for some time separately engaged in the lawful business of buying, selling and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and transfer the same to respondents, with the intent and purpose that such tickets shall be used by the second purchaser thereof, but respondents deny that such use is a violation in law or in fact of the terms thereof. And respondents deny any knowledge that such use of said tickets by persons other than the original holders, is any fraud upon complainant or the railways issuing such tickets when the same are genuine and *bona fide*—and respondents again aver that it is a matter of no concern or interest to the complainant or the railways issuing such tickets, whether the original purchasers are the holders and presenters of the same, or whether the holder has purchased said ticket from the original purchaser, or whether such holder has purchased the same from a ticket broker, or whether, as frequently happens, one of such tickets is accidentally or otherwise exchanged for another of the same class and form.

for an approaching Mardi Gras festival, a further injunction *pendente lite* was granted as to dealings in the non-transferable reduced rate round trip tickets issued for use on the occasion of the aforesaid Mardi Gras festival.

Thereafter a demurrer was filed to the bill for want of equity and because the case made by the bill was a moot and not a real controversy, and it was overruled. Then an application was made for leave to file a plea to the jurisdiction, which was refused.

At the hearing the complainant introduced the depositions of two witnesses and no evidence was given on behalf of the defendants. As before stated, the Circuit Court entered a final decree perpetually enjoining the dealing in non-transferable reduced rate round trip tickets issued for the United Confederate Veterans' Reunion and the Mardi Gras festivals, and denying relief as to future issues of tickets of a like character.

On appeal and cross appeal the Circuit Court of Appeals held that the complainant was entitled to the full relief prayed in the bill, and consequently to an injunction restraining the dealing by the defendants not only in the tickets issued for the United Confederate Veterans' Reunion and the past Mardi Gras festival, but from carrying on the business of like dealing in non-transferable reduced rate tickets which might be issued in the future by the complainant, and the Circuit Court was directed to decree accordingly.

Mr. Louis Marshall, with whom *Mr. Henry L. Lazarus* and *Mr. Moritz Rosenthal* were on the brief, for petitioners:

The bill of complaint does not state a cause of action, either at law or in equity, against any of the defendants, even though the tickets in which they dealt, were in form non-transferable, and the original purchasers disposed of them in breach of their contracts with the complainant.

A railroad ticket is property in the constitutional sense of the term, and the business of a ticket broker is legitimate, and legislation seeking to prohibit it is a violation of the liberty of

the citizen and violative of both the state and Federal Constitutions. *People ex rel. Fleischmann* v. *Caldwell*, 64 App. Div. 46, aff'd, 168 N. Y. 671; *People ex rel. Tyroler* v. *The Warden*, 157 N. Y. 116.

A ticket broker in purchasing the unused portion of a railway ticket is not a party or a privy to the contract between the railway company and the original purchaser. He has no relation whatsoever with either, except that he has purchased from the original holder a ticket which the latter agreed that he would not sell. There is nothing to indicate that the ticket broker in purchasing the ticket from the original holder and selling it to a third person acted out of malice toward the railway company; in fact his motive is believed to be unimportant. *Adler* v. *Fenton*, 24 How. 407; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 190; *McMullen* v. *Ritchie*, 64 Fed. Rep. 253; *Toler* v. *East Tenn. Ry. Co.*, 67 Fed. Rep. 168; *Morris* v. *Tuthill*, 72 N. Y. 575; *Davis* v. *Flagg*, 35 N. J. Eq. 491; *Phelps* v. *Nowlen*, 72 N. Y. 39.

The theory of the complainant precludes the conception of a privity of contract, since the very foundation of its contention is, that the contract between it and the original purchaser of the ticket was non-assignable. *Spencer's case*, 5 Coke, 16a; 1 Smith's Leading Cases, 68; *Garst* v. *Hall & Lyon Co.*, 179 Massachusetts, 588; *Harrison* v. *Maynard Merrill Co.*, 61 Fed. Rep. 689; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659; *Apollinaris Co.* v. *Scherer*, 27 Fed. Rep. 18.

An action against these ticket brokers could not be rested upon any theory of tort. It is difficult to see in what respect the act of the broker constitutes a tort or a breach of duty owing by him to the railroad company. He certainly occupies to it no relation of trust or confidence, nor is there any statutory duty or one of a kindred nature that he owes to the railroad company.

In order to support its theory the complainant failed to establish the validity of the condition of non-transferability which it has sought to impress upon its tickets. The railroad company

doubtless had the right to impose reasonable conditions upon its passengers, the right to require the production of a ticket whenever demanded, to limit the ticket as to time, and train on which it was to be used, to require it to be stamped before being used. The ticket, however, is property and a common carrier, bound to transport all seeking its conveniences, without discrimination, has no right to prohibit the sale and disposition of such ticket, because that would have been the equivalent of depriving the owner of it of an essential attribute of the property which he had acquired, and the creation of an unjust discrimination, between those seeking transportation over its lines. *Mosher* v. *Railway Company*, 127 U. S. 390, and *Boylan* v. *Railroad Company*, 132 U. S. 146, discussed and distinguished.

But assuming that the contract of non-transferability was valid, and that the original purchaser of the ticket committed a breach of contract when he disposed of it, that fact would not support an action at law against the ticket broker under the circumstances of this case. The broker did not, by fraud, force or coercion, or by malicious act, bring about such breach of contract, and the case does not therefore fall within the rule laid down in *Angle* v. *Chicago, St. Paul &c. Ry. Co.*, 151 U. S. 1.

Even though the acts charged are wrongful, tortious or even fraudulent, complainant has a plain, adequate and complete remedy at law to redress such wrongs, and is not entitled to equitable relief. *Hipp* v. *Babin*, 19 How. 278; *Parker* v. *Winnipiseogee Lake Co.*, 2 Black, 551; *Ins. Co.* v. *Bailey*, 13 Wall. 621; *Grand Chute* v. *Winegar*, 15 Wall. 375; *Root* v. *Ry. Co.*, 105 U. S. 212; *Killian* v. *Ebbinghaus*, 110 U. S. 573; *Fussell* v. *Gregg*, 113 U. S. 555; *Buzard* v. *Houston*, 119 U. S. 351; *Cates* v. *Allen*, 149 U. S. 451; *Whitehead* v. *Shattuck*, 138 U. S. 146.

There was an improper joinder of defendants and of independent causes of action. The bill is multifarious and the case does not fall within the rule concerning the avoidance of a multiplicity of suits. *Pfohl* v. *Simpson*, 74 N. Y. 142; *Boughton* v. *City of Brooklyn*, 15 Barb. 375; 2 Story Eq. Jur., §§ 853, 854; *Tribette* v. *Railroad Co.*, 70 Mississippi, 182.

The Circuit Court was without jurisdiction, notwithstanding the colorable averments contained in the bill that the injury sustained in consequence of the defendants' acts exceeded two thousand dollars, there being no foundation in fact in support of such averment.

The complainant does not indicate from the record a specific piece of property actually in existence, for which the protection of a court of equity is sought. It is asking for the protection of a business not *in esse*, but to arise in the future, and which the court will not presume will be attacked injuriously before it comes into existence. *Bank of Arapahoe* v. *David Bradley Co.*, 72 Fed. Rep. 867.

The decree of injunction awarded by the Circuit Court of Appeals, so far as it relates to non-transferable tickets, that may be hereafter issued, is in effect the exercise of legislative as distinguished from judicial power, since it undertakes to promulgate a rule applicable to conditions and circumstances, which have not yet arisen, and to prohibit the petitioners from dealing in tickets not *in esse* and not even in contemplation, and is, therefore, violative of the most fundamental principle of our government.

Mr. Joseph Paxton Blair and *Mr. Brode B. Davis*, with whom *Mr. George Denegre* was on the brief, for respondent:

Defendants filed no formal plea to the jurisdiction, but simply denied, in their answer, the averments of the bill in respect to the amount of damages. Under such circumstances, proof of damages was not necessary to sustain the jurisdiction. *Butchers & Drovers Stock Yards Co.* v. *L. & N. R. R. Co.* (C. C. A.), 67 Fed. Rep. 35, 40; *Moffet* v. *Quine*, 95 Fed. Rep. 201.

The legislatures of many States have appreciated the unlawful and fraudulent character of the ticket scalpers' business, and statutes have been enacted making their dealing in these tickets a violation of the criminal law in the following States, viz: Pennsylvania, New Jersey, Illinois, Indiana, Minnesota, Georgia, Maine, Texas, North Carolina, Tennessee, North

Dakota, Oregon, Montana, Florida and New York. Such laws have been held constitutional by the courts of last resort on the broad question of the right of the scalpers to buy and sell these tickets without the authority of the railroad company issuing them, in all those States in which the question has been raised, with the exception of New York. *Fry* v. *State*, 63 Indiana, 552; *Burdick* v. *People*, 149 Illinois, 600; *State* v. *Corbett*, 57 Minnesota, 345; *Jannen* v. *State*, 42 Texas Cr. Rep. 631; *Commonwealth* v. *Keary*, 198 Pa. St. 500; *State* v. *Bernheim*, 19 Montana, 512; *Ex parte O'Neil*, 83 Pac. Rep. 104; *Samuelson* v. *State*, 95 S. W. Rep. 1012; *State* v. *Thompson*, 84 Pac. Rep. 476.

The contract evidenced by the non-transferable tickets described in complainant's bill is a legal contract between the railroad company and the original purchaser of such tickets, and it binds the parties thereto and limits the benefits of the contract to the use of the original purchaser only. No one other than such purchaser can become the beneficiary of the contract, and under its terms the railroad company is under no obligation to carry as a passenger any person presenting such ticket unless such person is in fact the original purchaser. *Mosher* v. *Railroad Co.*, 127 U. S. 390; *Boylan* v. *Hot Springs Co.*, 123 U. S. 146; *Drummond* v. *Sou. Pac. Co.*, 7 Utah, 118; *S. C.*, 25 Pac. Rep. 733. The right of a railroad company to issue such tickets is not confined to occasional events, but may be issued at any time, or continually during a season. The right is recognized in unlimited terms in § 22 of the Interstate Commerce Act, 3 U. S. Comp. Stat. 3170.

It follows, therefore, that the sale of such a ticket by the original purchaser is a violation of a legal contract, and the use of one of these tickets by a person other than the original purchaser is a fraud upon the carrier.

Such a ticket is not property in the hands of the purchaser in the sense that it can be transferred or sold by him; and trafficking in such tickets is not, and cannot be made, a legitimate business. See also *State* v. *Corbett*, 57 Minnesota, 345; *Jannin*

v. *State*, 53 L. R. A. 349; *Burdick* v. *People*, 149 Illinois, 600; *Drummond* v. *Sou. Pac. Co.*, 25 Pac. Rep. 733; *Cody* v. *Sou. Pac. R. Co.*, 4 Sawyer, 114; *Samuelson* v. *State*, 95 S. W. Rep. 1012.

Equity has jurisdiction to enjoin the defendant ticket scalpers from present or future interference in contracts between complainant and the purchasers of its tickets. *Exchange Telegraph Co.* v. *Central News Co.*, 2 Ch. 48; *Ex. Tel. Co.* v. *Howard Agency*, L. T. Vol. 120, March 31, 1906; *Am. Law Book Co.* v. *Ed. Thompson Co.*, 84 N. Y. Supp. 225; *Fleckenstein Bros. Co.* v. *Fleckenstein* (N. J. Ch.), 57 Atl. Rep. 1025; *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 128 Fed. Rep. 800–1015; *Sperry & Hutchinson Co.* v. *Brady*, 134 Fed. Rep. 691; *Sperry & Hutchinson Co.* v. *Temple*, 137 Fed. Rep. 992; *Natl. Tel. Co.* v. *Western Union Co.*, 119 Fed. Rep. 294; *Garst* v. *Charles*, 187 Massachusetts, 144; *Board of Trade* v. *Christie Co.*, 198 U. S. 236; *Board of Trade* v. *Cella Co.*, 145 Fed. Rep. 28; *Board of Trade* v. *McDearmott*, 143 Fed. Rep. 188; *Knudson* v. *Benn*, 123 Fed. Rep. 636; *Martin* v. *McFall*, 65 N. J. Equity, 91; *Wells & Richardson Co.* v. *Abraham*, 146 Fed. Rep. 190.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The points urged at bar on behalf of the petitioners as establishing that the decrees below should be reversed and the bill of complaint dismissed, and in any event the injunction be modified and restricted, are the following:

"1. The bill of complaint does not state a cause of action, either at law or in equity, against any of the defendants, even though the tickets in which they dealt are in form non-transferable, when the original purchasers disposed of them in breach of their contract with the complainant."

"2. The complainant has shown no sufficient ground for equitable intervention, since, assuming, but not admitting, that the acts charged against the defendants are wrongful, tortious or even fraudulent, it has a plain, adequate and complete remedy at law to redress such wrongs."

"3. There was an improper joinder of defendants and of independent causes of action. The bill is multifarious and the case does not fall within the rule concerning the avoidance of a multiplicity of suits."

"4. The Circuit Court was without jurisdiction, notwithstanding the colorable averments contained in the bill that the injury sustained in consequence of the defendants' act exceeded two thousand dollars, there being no foundation in fact in support of such averment."

"5. The decree of injunction awarded by the Circuit Court of Appeals, so far as it relates to non-transferable tickets, that may be hereafter issued, is in effect the exercise of legislative as distinct from judicial power, since it undertakes to promulgate a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit the petitioners from dealing in tickets not *in esse*, and not even in contemplation, and is, therefore, violative of the most fundamental principle of our Government."

Stated in logical sequence and reduced to their essence, these propositions assert:

First, want of jurisdiction from the insufficiency of the amount involved, want of power in a court of equity to grant relief because on the face of the bill relief at law was adequate, and because equitable relief was improper on account of misjoinder of parties and causes of action.

Second, because the case as made did not entitle to relief, since it did not show the commission of any legal wrong by the defendants.

Third, because conceding the right to relief the remedy by injunction which the court accorded was so broad as in effect to amount to the exertion of legislative as distinct from judicial power, and hence was equivalent to the denial of due process of law.

As, for reasons hereafter to be stated, we think the contentions embodied in the first proposition as to want of jurisdiction, etc., are without merit, we come at once to the funda-

mental question involved in the second proposition, that is, the absence of averment or proof as to the commission of a legal wrong by the defendant.

That the complainant had the lawful right to sell non-transferable tickets of the character alleged in the bill at reduced rates we think is not open to controversy, and that the condition of non-transferability and forfeiture embodied in such tickets was not only binding upon the original purchaser but upon any one who acquired such a ticket and attempted to use the same in violation of its terms is also settled. *Mosher* v. *Railroad Co.*, 127 U. S. 390. See, also, *Boylan* v. *Hot Springs Co.*, 132 U. S. 146.

True these cases were decided before the passage of the act to regulate commerce, but the power of carriers engaged in interstate commerce to issue non-transferable reduced rate excursion tickets was expressly recognized by that act, and the operation and binding effect of the non-transferable clause in such tickets upon all third persons acquiring the same and attempting to use them, and the duty of the carrier in such case to use due diligence to enforce a forfeiture results from the context of the act. Thus by § 22 (24 Stat. 387; 25 Stat. 862) it was provided "that nothing in this act shall prevent . . . the issuance of mileage, excursion, or commutation tickets." And it is to be observed that despite the frequent changes in the act including the comprehensive amendments embodied in the act of June 29, 1906, 34 Stat. 584, the provision in question remains in force, although the Interstate Commerce Commission, charged with the administrative enforcement of the act, has directed the attention of Congress to the importance of defining the scope of such tickets in view of the abuses which might arise from the exercise of the right to issue them. 2 Int. Com. Comm. Rep. 529, 539. And when the restrictions embodied in the act concerning equality of rates and the prohibitions against preferences are borne in mind the conclusion cannot be escaped that the right to issue tickets of the class referred to carried with it the duty on the

carrier of exercising due diligence to prevent the use of such tickets by other than the original purchasers, and therefore caused the non-transferable clause to be operative and effective against anyone who wrongfully might attempt to use such tickets. Any other view would cause the act to destroy itself, since it would necessarily imply that the recognition of the power to issue reduced rate excursion tickets conveyed with it the right to disregard the prohibitions against preferences which it was one of the great purposes of the act to render efficacious. This must follow, since, if the return portion of the round trip ticket be used by one not entitled to the ticket, and who otherwise would have had to pay the full one way fare, the person so successfully traveling on the ticket would not only defraud the carrier but effectually enjoy a preference over similar one way travelers who had paid their full fare and who were unwilling to be participants in a fraud upon the railroad company.

Any third person acquiring a non-transferable reduced rate railroad ticket from the original purchaser, being therefore bound by the clause forbidding transfer, and the ticket in the hands of all such persons being subject to forfeiture on an attempt being made to use the same for passage, it may well be questioned whether the purchaser of such ticket acquired anything more than a limited and qualified ownership thereof, and whether the carrier did not, for the purpose of enforcing the forfeiture, retain a subordinate interest in the ticket amounting to a right of property therein which a court of equity would protect. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, and authorities there cited. See also, *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 128 Fed. Rep. 800. We pass this question, however, because the want of merit in the contention that the case as made did not disclose the commission of a legal wrong conclusively results from a previous decision of this court. The case is *Angle* v. *Chicago, St. Paul &c. Ry. Co.*, 151 U. S. 1, where it was held that an actionable wrong is committed by one who "maliciously

interferes in a contract between two parties and induces one of them to break that contract to the injury of the other." That this principle embraces a case like the present, that is, the carrying on of the business of purchasing and selling non-transferable reduced rate railroad tickets for profit to the injury of the railroad company issuing such tickets is, we think, clear. It is not necessary that the ingredient of actual malice in the sense of personal ill will should exist to bring this controversy within the doctrine of the *Angle case*. The wanton disregard of the rights of a carrier causing injury to it, which the business of purchasing and selling non-transferable reduced rate tickets of necessity involved, constitute legal malice within the doctrine of the *Angle case*. We deem it unnecessary to restate the grounds upon which the ruling in the *Angle case* was rested or to trace the evolution of the principle in that case announced, because of the consideration given to the subject in the *Angle case* and the full reference to the authorities which was made in the opinion in that case.

Certain is it that the doctrine of the *Angle case* has been frequently applied in cases which involved the identical question here at issue—that is, whether a legal wrong was committed by the dealing in non-transferable reduced rate railroad excursion tickets. *Pennsylvania Railroad Co.* v. *Beekman*, 30 Wash. (D. C.) Law Rep. 715; *Ill. Central R. R. Co.* v. *Caffrey*, 128 Fed. Rep. 770; *Delaware, Lack. & West. R. R. Co.* v. *Frank*, 110 Fed. Rep. 689; *Nashville, C. & St. L. Ry. Co.* v. *McConnell*, 82 Fed. Rep. 65.

Indeed, it is shown by decisions of various state courts of last resort that the wrong occasioned by the dealing in non-transferable reduced rate railroad tickets has been deemed to be so serious as to call for express legislative prohibition correcting the evil. *Kinner* v. *Lake Shore & Mich. Southern Ry. Co.*, 69 Ohio St. 339; *Schubach* v. *McDonald*, 179 Missouri, 163, and cases cited; *Samuelson* v. *State*, 95 S. W. Rep. 1012. In the case last referred to, where the subject is elaborately reviewed, the Supreme Court of Tennessee, in holding that the

prohibitive statute was not unconstitutional as forbidding a lawful business and in affirming a criminal conviction for violating the statute observed (p. 1016):

"That the sale as well as the purchase of non-transferable passage tickets is a fraud upon the carrier and the public, the tendency of which is the demoralization of rates, has been settled by the general consensus of opinion amongst the courts."

Concluding, as we do, that the commission of a legal wrong by the defendants was disclosed by the case as made, we are brought to consider the several contentions concerning the jurisdiction of the court and its right to afford relief. The bill contained an express averment that the amount involved in the controversy exceeded, exclusive of interest and costs, the sum of five thousand dollars as to each defendant. The defendants not having formally pleaded to the jurisdiction, it was not incumbent upon the complainant to offer proof in support of the averment. Nevertheless the complainant introduced testimony tending to show that on the New Orleans division of its road a loss of from fifteen to eighteen thousand dollars a year was sustained through the practice by dealers of wrongfully purchasing and selling non-transferable tickets. That hundreds of the tickets annually issued for the Mardi Gras festivals in New Orleans were wrongfully bought and sold; that other non-transferable reduced rate tickets were in a like manner illegally trafficked in to the great damage of the corporation, and that the defendants were the persons principally engaged in conducting such wrongful dealings. But even if this proof be put out of view we think the contention that a consideration of the whole bill establishes that the jurisdictional amount alleged was merely colorable and fictitious, is without merit. We say this because the averments of the bill as to the number of such tickets issued, the recurring occasions for their issue, the magnitude of the wrongful dealings in the non-transferable tickets by the defendants, the cost and the risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the revenue of the complainant, the

operation of the illegal dealing in such tickets upon the right of the complainant to issue them in the future, coupled with the admissions of the answer, sustain the express averment as to the requisite jurisdictional amount. Besides the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced. *Hunt* v. *N. Y. Cotton Exchange*, 205 U. S. 322, 336.

The contention that, though it be admitted, for the sake of the argument, that the acts charged against the defendant "were wrongful, tortious, or even fraudulent," there was no right to resort to equity because there was a complete and adequate remedy at law to redress the threatened wrongs when committed is, we think, also devoid of merit. From the nature and character of the non-transferable tickets, the number of people to whom they were issued, the dealings of the defendants therein and their avowed purpose to continue such dealings in the future, the risk to result from mistakes in enforcing the forfeiture provision and the multiplicity of suits necessarily to be engendered if redress was sought at law, all establish the inadequacy of a legal remedy and the necessity for the intervention of equity. Indeed the want of foundation for the contention to the contrary is shown by the opinions in the cases which we have previously cited in considering whether a legal wrong resulted from acts of the character complained of, since in those cases it was expressly held that the consequences of the legal wrong flowing from the dealing in non-transferable tickets were of such a character as to entitle an injured complainant to redress in a court of equity.

There is an opinion of the Supreme Court of New York (not the court of last resort) which would seem to express contrary views, *New York Central & H. R. R. R. Co.* v. *Reeves*, 85 N. Y. Supp. 28, but the reasoning there relied on, in our opinion, is inconclusive.

The proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the Circuit Court of Appeals, and, therefore, might well be held not to be open. But passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions. Under these conditions the case is brought within the principle laid down in *Hale* v. *Allinson*, 188 U. S. 56, 77.

As we have stated, the Circuit Court granted a preliminary injunction restraining the defendants from illegally dealing in tickets issued on account of the United Confederate Veterans' Reunion, and before final hearing granted a second injunction restraining such dealing in like tickets issued for the approaching Mardi Gras festival. By the final decree these injunctions were perpetuated, the court declining to grant the relief sought by the complainant in relation to non-transferable tickets to be issued for the future, without prejudice, however, to the right of the complainant to seek relief by independent proceedings on each occasion when it might issue such non-transferable tickets. The Circuit Court of Appeals decided that error had been committed in refusing to grant an injunction against dealing in non-transferable tickets to be issued in the future, and directed that the decree below be enlarged in that particular. It is insisted that the Circuit Court of Appeals erred in awarding an injunction as to dealings "in non-transferable tickets that may be hereafter issued . . . since it thereby undertook to promulgate" a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit "the petitioners from dealing in tickets not *in esse* . . . and is, therefore, violative of the most fundamental principles of our government." But when the broad nature of this proposition is considered it but denies that there is power in

a court of equity in any case to afford effective relief by injunction. Certain is it that every injunction in the nature of things contemplates the enforcement as against the party enjoined of a rule of conduct for the future as to the wrong to which the injunction relates. Take the case of trespasses upon land where the elements entitling to equitable relief exist. See *Slater* v. *Gunn*, 170 Massachusetts, 509, and cases cited. It may not be doubted that the authority of a court would extend, not only to restraining a particular imminent trespass, but also to prohibiting like acts for all future time. The power exerted by the court below which is complained of was in no wise different. The bill averred the custom of the complainant at frequently occurring periods to issue reduced rate non-transferable tickets for fairs, conventions, etc., charged a course of illegal dealing in such non-transferable tickets by the defendants, and sought to protect its right to issue such tickets by preventing unlawful dealings in them. The defendants in effect not only admitted the unlawful course of dealing as to particular tickets then outstanding, but expressly avowed that they possessed the right, and that it was their intention to carry on the business as to all future issues of a similar character of tickets. The action of the Circuit Court of Appeals, therefore, in causing the injunction to apply not only to the illegal dealings as to the then outstanding tickets, but to like dealings as to similar tickets which might be issued in the future, was but the exertion by the court of its power to restrain the continued commission against the rights of the complainant in the future of a definite character of acts adjudged to be wrongful. Indeed, in view of the state of the record, the inadequacy of the relief afforded by the decree as entered in the Circuit Court is, we think, manifest on its face. The necessary predicate of the decree was the illegal nature of the dealings by the defendants in the outstanding tickets, and the fact that such dealings if allowed would seriously impair the right of the complainant in the future to issue the tickets. Doubtless, for this reason the decree was made with-

out prejudice to the right of the complainant to apply for relief as to future issues of tickets by independent proceedings whenever on other occasions it was determined to issue non-transferable tickets. But this was to deny adequate relief, since it subjected the complainant to the necessity, as a preliminary to the exercise of the right to issue tickets, to begin a new suit with the object of restraining the defendants from the commission in the future of acts identical with those which the court had already adjudged to be wrongful and violative of the rights of the complainant.

In *Scott* v. *Donald*, 165 U. S. 107, on holding a particular seizure of liquor under the South Carolina dispensary law to be invalid, an injunction was sustained, not only addressed to the seizure in controversy, but which also operated to restrain like seizures of liquors in the future, and the exertion of the same character of power by a court of equity was upheld in the cases of *Donovan* v. *Pennsylvania Company*, 199 U. S. 279, and *Swift* v. *United States*, 196 U. S. 375.

Nor is there merit in the contention that the decision in *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361, 404, supports the view here relied upon as to the limited authority of a court of equity to enjoin the continued commission of the same character of acts as those adjudged to be wrongful. On the contrary, the ruling in that case directly refutes the claim based on it. There certain acts of the carrier were held to have violated the act to regulate commerce. The contention of the Government was that because wrongful acts of a particular character had been committed, therefore an injunction should be awarded against any and all violations in the future of the act to regulate commerce. Whilst this broad request was denied, it was carefully pointed out that the power existed to enjoin the future commission of like acts to those found to be illegal, and the injunction was so awarded. The whole argument here made results from a failure to distinguish between an injunction generally restraining the commission of illegal acts in the

future and one which simply restrains for the future the commission of acts identical in character with those which have been the subject of controversy and which have been adjudged to be illegal.

Affirmed.